

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA

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NANCY H.  
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\_\_\_\_\_  
ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, et al.,

Defendants.  
\_\_\_\_\_

Civil Action No. 96-1285 (RCL)

(Judge Lamberth)

**THE DEPARTMENT OF THE INTERIOR'S OBJECTIONS  
TO CORRECTED REPORT OF THE SPECIAL MASTER  
REGARDING THE DELETION OF INDIVIDUAL INDIAN TRUST  
INFORMATION BY FORMER ASSISTANT SECRETARY-INDIAN  
AFFAIRS NEAL MCCALED**

On January 27, 2003, the Special Master issued his report (the "Corrected Report") of his investigation of allegations that between December 2001 and early October 2002, former Assistant Secretary Neal McCaleb failed to print out and file e-mail messages he received and may have deleted the messages before they were captured on backup tapes. On the basis of an investigation concerning the e-mail practices of a particular former Department of the Interior official, the Special Master's report draws certain conclusions about the Department's recordkeeping practices that are legally incorrect and/or factually erroneous. The Department's objections follow.

1. The Corrected Report apparently reached factual conclusions that the Department as an institution had failed to take required actions to ensure that records were maintained. This conclusion is not supported by the record. The Special Master recognizes that the Department of the Interior has promulgated "numerous regulations and directives governing the retention of electronic correspondence." Corrected Report at 12. Indeed, the report lists four directives

issued during Mr. McCaleb's tenure as Assistant Secretary concerning policies for the retention of records and information transmitted by e-mail, *id.* at 12-13, and identifies eight other directives issued before Mr. McCaleb took office, *id.* at 13-14 n.8. *See also* Attachments 1-3 to the Corrected Report.

The report also reflects that other employees in the Office of Assistant Secretary whose recordkeeping practices were examined had adhered to the Department's directives. Corrected Report at 31-33. The report specifically cited the recordkeeping practices of Jean Maybee, Deputy Assistant Secretary Aurene Martin, and Acting Deputy Commissioner Terry Virden. *Id.* at 32-33, and 33 n.32. Further, the report quotes with approval testimony that Mr. McCaleb's predecessor, Kevin Gover, printed out and retained e-mails, and that former Deputy Commissioner Sharon Blackwell was a "fanatic" in retaining her e-mails, *id.* at 33.

In sum, the evidence developed in the Special Master's investigation, as set forth in the Corrected Report and the attachments to the report show that, first, the Department repeatedly provided directions to employees concerning their obligations on the retention of records transmitted by e-mail, and second, that other employees whose e-mail practices the Special Master examined in the course of his investigation adhered to the policies set forth in the Department's directives. Consequently, the Special Master's conclusory statements that the "current state of affairs can best be described as chaotic," *id.* at 51, or that the Department used "an enfeebled data-transmission backup policy that virtually ensured trust communications would neither be captured nor preserved," *id.* at 1, are contradicted by the evidence developed in the investigation and therefore are clearly erroneous.<sup>1</sup>

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<sup>1</sup> Moreover, contrary to the Special Master's apparent assumption, the Department did not  
(continued...)

2. The Special Master implies that Mr. McCaleb erased trust information not only from his own e-mail inbox but also from the Department's records. *See* Corrected Report at 1, 40. This finding is without evidentiary support and is speculative. The trust information would be erased from the Department's records only if:

- (1) the sender and each recipient of the e-mail, contrary to repeated directives, failed to print out and file the trust information;
- (2) the sender and each recipient deleted the e-mail;
- (3) the sender and each recipient, contrary to e-mailed instructions, deleted the e-mail before the e-mail was successfully captured on a Friday backup tape<sup>2</sup>; and
- (4) the trust information existed solely in the e-mail, and had not been preserved in any other media, such as on paper or a computer hard drive, or in other data collections.

There is simply no evidence indicating that all of the above contingencies occurred. The Special Master speculates that Department employees who sent e-mails to Mr. McCaleb may have been "equally remiss in the administration of their electronic correspondence" because the Department had allegedly not provided training. Corrected Report at 40. The conclusion that the Department had not provided training is based on the deposition testimony of Aurene Martin and Jean Maybee that they had received no training. As discussed above, the Special Master

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<sup>1</sup>(...continued)

use a data-transmission backup policy, enfeebled or otherwise, to capture or preserve trust records. Rather, as is clear from the directives attached to the Corrected Report, employees were directed to print out e-mails containing trust information or which constituted federal records.

<sup>2</sup> After the Friday backup had been successfully completed, notifications were sent to each user's computer stating the date of the successful backup, reminding users that they were required to print and file all e-mail messages relating to the "Three Functional Areas," and instructing users not to delete any e-mails pertaining to the Three Functional Areas received after the date of the successful Friday backup "until you receive another message similar to this one indicating the retention Backup has been successful." Corrected Report at 38 and Attachment 4 (emphasis omitted).

apparently approved of the record retention practices of Ms. Martin and Ms. Maybee. As also discussed above, the Department had repeatedly instructed employees on record retention requirements.

More fundamentally, there is no basis for the Special Master's apparent assumption that there was any trust information that existed solely in the form of a BIA e-mail sent to Mr. McCaleb. The Special Master cites Mr. McCaleb's testimony that he deleted e-mails containing the OIRM Morning Report. Corrected Report at 16-17. However, Mr. McCaleb testified that he subsequently was able to obtain paper copies of all of the OIRM Morning Reports. Deposition of Neal McCaleb, December 6, 2002 ("McCaleb Dep.") at 60 (attached in full as Exhibit 2).<sup>3</sup> During the period in question, December 2001 to October 2002, BIA's trust responsibilities were limited to leasing of land resources, collection of funds and computing of funds for distribution. *Id.* at 30. We are aware of no evidence that the lease and accounting records generated by these trust responsibilities were created in e-mails that would have initially been sent to or received from Mr. McCaleb, and logic dictates otherwise.

The Special Master's apparent finding that Mr. McCaleb erased e-mails containing trust information from his own inbox before they were captured on retained backup tapes, Corrected Report at 16, has little if any record support. As the Special Master noted, throughout the period in question, it was BIA's policy to retain Friday backup tapes for BIA e-mails. *Id.* at 38. If the Friday backup was successful, notifications were sent to each user's computer. Mr. McCaleb was away from his office on a majority of the working days between December 2001, and October

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<sup>3</sup>The attached transcript of the McCaleb deposition bears the erroneous label "Confidential – Subject to Protective Order." See Exhibit 2, at 1. As noted in the December 12, 2002 letter from Amalia D. Kessler, Department of Justice, to Alan L. Balaran, Special Master (attached as Exhibit 3), the deposition was not subject to a protective order.

2002, and he did not access his e-mails while on travel. *See* Corrected Report, Attachment 8, November 8, 2002 Letter from Sabrina McCarthy, Department of the Interior, to Peter B. Miller, Department of Justice (the "McCarthy letter") at 1-2, and 3 n.3. Zantaz, a Department of the Interior contractor, has conducted an initial audit of the backup tapes and found 7,136 e-mails sent or received by Mr. McCaleb. *See* Attachment 4 to the January 2003 Report of the Special Master, Zantaz report at 3 (Exhibit 1 to this memorandum).<sup>4</sup> The record reflects that between December 6, 2001, when BIA's access to the Internet was shut down, and June 20, 2002, Mr. McCaleb was able to receive e-mails only from employees of the Office of the Assistant Secretary-Indian Affairs and from BIA employees. *See* McCarthy letter at 2. After June 20, 2002, he was also able to receive e-mails from the Office of Special Trustee. *Id.* at 2 n.1. BIA's trust responsibilities were limited to leasing of land resources, collection of funds and computing of funds for distribution. McCaleb Dep. at 30. Therefore, Mr. McCaleb was able to receive by e-mail limited types of trust information from a limited number of DOI employees. While it is possible that the retained backup tapes did not capture all of Mr. McCaleb's e-mails, and it is also possible that one or more of the missing e-mails contained trust information, under these circumstances a finding that he erased from his inbox trust information not captured in the backup tapes rests only on the Special Master's skepticism about Mr. McCaleb's deposition testimony.

3. The Corrected Report incorrectly describes the issue decided in the Master's July 27, 2001 opinion in this matter in stating that "on July 27, 2001, the Special Master reported that Interior had 'ignored its duty to retain and preserve backup tapes of e-mail messages' in

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<sup>4</sup> Some of the messages found by Zantaz might be duplicates, if Mr. McCaleb had not deleted messages between successful Friday backups.

derogation of its trust responsibilities." Corrected Report at 11. While overwriting of backup tapes may violate the discovery obligations imposed by the July 27, 2001 opinion, overwriting does not violate any trust responsibility. The July 27, 2001 opinion was directed solely to Interior's **discovery** obligations, and not to trust responsibilities. The complete sentence from the July 27, 2001 opinion confirms that the opinion pertained to discovery obligations only: "In sum, defendant has ignored its duty to retain and preserve backup tapes of e-mail messages responsive to the Third Formal Request for Production of Documents." July 27, 2001 opinion, at 18. The opinion was occasioned by a discovery dispute – specifically, Interior's Motion for a Protective Order Clarifying Duty to Produce E-Mail Records (filed Aug. 2, 2000). Even the August 12, 1999 Order regarding document retention did not require retention of backup tapes. *See* Attachment 1 to Corrected Report.

4. The Corrected Report contains an extended discussion on Aurene Martin's actions in preparing a draft affidavit for Mr. McCaleb, Corrected Report at 47-51, and concludes that her conduct was "troubling." *Id.* at 51. The entire discussion is gratuitous to the investigation, and the criticism of Ms. Martin is unwarranted and unsupported. On the record developed, there is no basis to question her explanation of the events – that after talking by telephone with Mr. McCaleb about deleted e-mails, she typed up a draft affidavit so that there would be some documentation of the situation close to the time of the initial disclosure. *Id.* at 47-48. That the documentation was in the form of a draft affidavit rather than a memorandum is of no significance. Further, the Special Master specifically found that Ms. Martin had not sought to act as a legal representative of Mr. McCaleb in preparing the documentation. *Id.* at 47. The Master cites no regulation or policy of the Department that prohibited her from assisting Mr. McCaleb in a non-representative capacity. The draft prepared by Ms. Martin was not signed by Mr. McCaleb

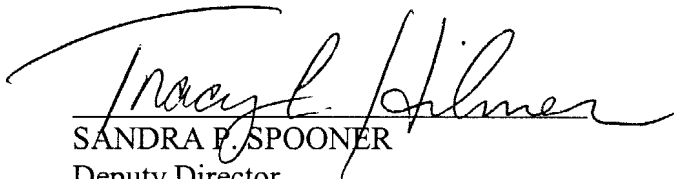
and was not submitted to the Special Master or the Court as his sworn declaration. The Special Master also questions why Ms. Martin did not incorporate Jean Maybee's recollections in the draft affidavit. *Id.* at 49-50. The draft affidavit was intended to record Mr. McCaleb's recollection. The record reflects that Ms. Maybee prepared her own statement, and the statement was made available to the Special Master. *Id.* at 50 and Attachment 17.

Respectfully submitted,

ROBERT D. McCALLUM, JR.  
Assistant Attorney General

STUART E. SCHIFFER  
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN  
MICHAEL F. HERTZ  
Directors

A handwritten signature in cursive script, appearing to read "Sandra P. Spooner", is written over a horizontal line.

SANDRA P. SPOONER  
Deputy Director  
D.C. Bar No. 261495  
Dodge Wells  
Senior Trial Counsel  
D.C. Bar No. 425194  
Tracy L. Hilmer  
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Trial Attorney  
Commercial Litigation Branch  
Civil Division  
P.O. Box 261  
Ben Franklin Station  
Washington, D.C. 20044  
(202) 307-0474

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 10, 2003 I served the foregoing *The Department of the Interior's Objections to Corrected Report of the Special Master Regarding the Deletion of Individual Indian Trust Information by Former Assistant Secretary-Indian Affairs Neal McCaleb* by facsimile, in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, N.W.  
Washington, D.C. 20036-2976  
(202) 822-0068

Dennis M Gingold, Esq.  
Mark Kester Brown, Esq.  
1275 Pennsylvania Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20004  
(202) 318-2372

By U.S. Mail upon:

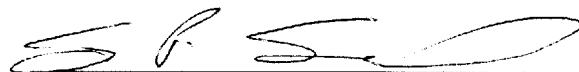
Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
Atlanta, GA 30309-4530

By Hand upon:

Joseph S. Kieffer, III  
Special Master Monitor  
420 7<sup>th</sup> Street, N.W.  
Apartment 705  
Washington, D.C. 20004

First 25 pages by facsimile; a complete copy to be delivered by hand February 11, 2003 upon:

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Avenue, N.W.  
12th Floor  
Washington, D.C. 20006  
(202) 986-8477



Sean P. Schmergel





U.S. Department of Justice  
Civil Division  
Commercial Litigation Branch  
P.O. Box 875, Ben Franklin Station  
Washington, D.C. 20044

Peter B. Miller

peter.miller@usdoj.gov

Tel. 202-307-0184

Fax 202-307-0494

By Hand: 1100 L Street NW, Room 10104, Washington, DC 20005

January 24, 2003

BY FACSIMILE AND FIRST CLASS MAIL

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Ave. NW, 12th Floor  
Washington, DC 20006

Re: Cobell v. Norton – January 21, 2003 Biweekly Report

Dear Mr. Balaran:

As discussed in Interior's portion of the January 21, 2003 biweekly report, we enclose the current status report regarding implementation of the E-Mail Proposal. See Electronic Email Archive System Status Report, January 24, 2003 (first section provided by Interior, second section by ZANTAZ).

Sincerely,

Peter B. Miller

Enclosure

cc: Distribution list for 1/21/03 biweekly report (see attached list)  
Sabrina McCarthy, Esq.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 21, 2003, I served the foregoing United States' Status Report to the Special Master of January 21, 2003 by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, NW  
Washington, DC 20036-2976  
202-822-0068

Dennis M Gingold, Esq.  
Mark Brown, Esq.  
1275 Pennsylvania Avenue, NW  
Ninth Floor  
Washington, DC 20004  
202-318-2372

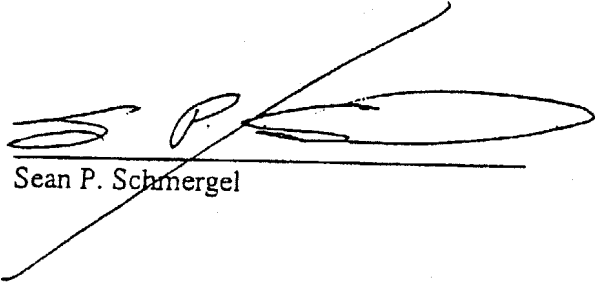
and by U.S. Mail upon:

Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
Atlanta, GA 30309-4530

and by U.S. Mail and by facsimile upon:

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Ave., NW  
12th Floor  
Washington, DC 20006  
202-986-8477

Joseph S. Kieffer, III, Esq.  
Special Master-Monitor  
420 7th Street, NW  
Apt 705  
Washington, DC 20004  
202-478-1958

  
Sean P. Schnergel

## Electronic Email Archive System (EEAS) Status Report

### January 24, 2003

#### Live E-mail

On January 15, 2003 the Minerals Management Service (MMS) began transmitting data live to Zantaz. MMS transmitted a total of 110,714 messages which are now stored in Zantaz Digital Safe.

On January 20, 2003 Virtual Private Networks were installed for the National Business Center (NBC) and on January 23, 2003 the NBC began transmitting data live to Zantaz. As of January 22, 2003 a total of 5,272 messages have been transmitted to Zantaz from the NBC.

#### Restoration

Zantaz has inventoried 1,699 tapes and restored 445 of these tapes from the Bureau of Indian Affairs (BIA). A total of 2,615,080 unique BIA e-mail messages have been transmitted to Zantaz Digital Safe.

#### Security

On January 15, 2003 two additional Zantaz contractors were favorably screened. The total number of favorably screened Zantaz contractors is now thirty-three.

#### Search Request

Zantaz has provided Interior a CD-ROM containing messages sent and received by former Assistant Secretary – Indian Affairs Neal McCaleb. This CD-ROM contains all Washington, DC messages present in the Digital Safe on January 14, 2003. There were a total of 7,136 messages found. Of these messages, a total of 105 messages were encrypted.

#### Privacy Act Notice

The Privacy Act Notice has been revised to include the Office of Surface Mining, the Bureau of Reclamation and the National Business Center and handed carried to the Federal Register on January 23, 2003.

#### Outstanding Issues:

DOI has requested Zantaz to provide a timeframe when DOI can expect to perform full text searches on Word Perfect documents.



# STATUS REPORT FOR DOI

Prepared January 22, 2003

## LIVE CAPTURE – IMPLEMENTATION STATUS

Bureau	Date Live Capture Began	Comments	Number of Messages in Digital Safe as of 01/22/03	MB stored in Digital Safe as of 01/22/03
BIA (Includes Office of the Assistant Secretary-Indian Affairs)	December 10, 2002	SMTP Relay Host in place at Reston site. Lotus Notes.	278,556	19,389
MMS	January 15, 2003	MS Exchange	110,714	4,330
NBC (Includes OAS-PMB, OS, and OHTA)	January 23, 2003	Lotus Notes (Messages in safe were captured during 3 hours of implementation testing on 01/21/03)	7,826	456
Catchall- Live Capture		Please see explanation of Catchall Repository on Page 4.	5,272	46
<b>TOTALS</b>			<b>402,368</b>	<b>24,221 MB</b>

Bureau	ESTIMATED Date Live Capture Can Begin	Comments
BLM	January 23, 2003 January 31, 2003	For 2 NT Servers – Lotus Notes For test AIX Servers – Lotus Notes
OST	February 4, 2003	Circuit Date Pending
OHA	February 6, 2003	Circuit Date Pending
SOL	February 15, 2003	Circuit Date Pending
BOR	Late February 2003	GroupWise email product
OSM	Late February 2003	GroupWise email product



STATUS REPORT FOR DOI --- 01/22/03 Continued

## UNIQUE TAPE MESSAGES IN DIGITAL SAFE AS OF JANUARY 22, 2003

BIA 2,615,080 messages 189,864 MB of storage  
 \*CATCHALL 20,562 messages 343 MB of storage

TOTALS FROM TAPE PROCESSING 2,635,642 messages 190,207MB of storage

\* Please see explanation of Catchall Repository on Page 4.

## COMPLETED BIA TAPE PROCESSING AS OF JANUARY 22, 2003

Location	Total Non-Gap Tapes	Total Gap Tapes	Total Tape Count	MB of Raw Tape Input Data Prior to Storing Unique Messages
Aberdeen	0	0	0	0
Albuquerque	0	0	0	0
Anadarko	0	0	0	0
Billings	42	71	113	1,323,528
Juneau	6	37	43	260,816
Minneapolis	0	11	11	118,274
Phoenix	0	0	0	0
Portland	32	62	94	1,035,178
Reston	16	30	46	569,750
Washington DC	30	108	138	2,609,538
<b>Totals</b>	<b>126</b>	<b>319</b>	<b>445</b>	<b>5,917,085</b>

## TAPES CURRENTLY INVENTORIED AND STORED AT ZANTAZ

ABE

208  
178  
386

ALB

39  
104  
143

Page 2 of 5

Pathways - D:\Department of Interior\BIA\BIA Reports from Zantaz to DOI\01-22-03\012203.doc

AND



31  
59  
90

556  
1143  
1699

Non-Gap      Gap      Total Tapes

There are also 500 tapes from SOL inventoried and stored at Zantaz.

## INITIAL AUDIT OF NEAL McCALEB EMAIL MESSAGES

As requested by DOI, Zantaz performed an Audit seeking messages where Neal McCaleb was either the Sender or the Recipient. This Audit included all messages present in the Digital Safe on January 14, 2003. This Audit is identified in the Zantaz tracking system as RQST2419.

There were 7,136 messages found that met the search criteria. Of these messages, 105 messages were encrypted. Zantaz sent a CD with the Audit results in NSF format to Sabrina McCarthy. Earlier today, Kimberly James of Zantaz worked with Sabrina to familiarize her with the format of the audit results.

## LOTUS NOTES ENCRYPTION ISSUES

**OVERVIEW-** The Lotus Notes email product provides the user the ability to encrypt messages on a message-by-message basis. The header of an encrypted message is NOT encrypted; but the body of the message is encrypted. The Lotus Notes product is designed to prevent the transfer of encrypted messages outside of the Lotus Notes environment. Thus, by Lotus design, only the header portion of an encrypted message was initially able to be stored in the Zantaz Digital Safe.

**LIVE CAPTURE -** Zantaz has now developed a process in which an encrypted message can be captured as an attachment and stored in the digital safe. The target date for having this new process available for DOI Live Capture of messages is January 29.

**TAPE PROCESSING -** Zantaz developed a similar process to capture encrypted messages during tape restoration. This new process is already in place for tapes being processed at this time. All of the original data is retained as an attachment. The data continues to be encrypted.

Zantaz will reprocess the tapes that were processed prior to completion of the new tape processing solution described above.



## EXPLANATION OF CATCHALL REPOSITORY

Zantaz has a Domain for storage of DOI Live Capture messages and a separate Domain for storage of Tape Restoration messages. Within each of these domains are Repositories for each Bureau or Office specified by DOI.

Within each Domain, there is also a repository called Catchall. The Catchall Repository is used for the storage of all messages containing header information that cannot be indexed properly. Several common problems are that the headers can be formatted incorrectly or it can contain unknown character sets.

Zantaz supports RFC1522 MIME (Multipurpose Internet Mail Extensions) standard as defined by the Internet Engineering Task Force (IETF). If the message header is coded improperly (for any reason) the entire email message is considered unparseable and is stored in the Catchall Repository.

Messages with an overall size greater than 30 MB cannot be indexed, so they are stored in Catchall.

Use of the Catchall Repository insures that no messages are lost even if the formatting of a message is flawed. Audits performed by Zantaz staff always check the Catchall Repository. (Catchall Tape and Catchall Live were both checked as a part of the Neal McCaleb Audit). Special techniques are used in searching Catchall using the Web Interface.

Zantaz continually seeks to improve the techniques for indexing messages. When enhancements are developed, Zantaz routinely reprocesses messages in Catchall to direct more of the messages into the specific repositories to which they were originally directed.

## 1 UNITED STATES DEPARTMENT OF JUSTICE

2

3 - - - - - X

4 ELOUISE PEPION COBELL, et al., :

5 Plaintiffs, :

6 v. : No. 96-1285

7 GALE NORTON, et al., :

8 Defendant. :

9 - - - - - X

10 CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

11 Washington, D.C.

12 Friday, December 6, 2002

13 Deposition of NEAL A. McCALEB, a  
14 witness herein, called for examination by Special  
15 Master Balaran in the above-entitled matter, the  
16 witness being duly sworn by PAUL GASPAROTTI, a  
17 Notary Public in and for the State of Maryland,  
18 taken at the offices of DFI International, 1717  
19 Pennsylvania Avenue, N.W., Washington, D.C., at  
20 10:05 a.m., Friday, December 6, 2002, and the  
21 proceedings being taken down by Stenotype by PAUL  
22 GASPAROTTI, and transcribed under his direction.

23

24

25



Page 2

## 1 APPEARANCES:

2  
3 On behalf of the Plaintiff:

4 DENNIS GINGOLD, ESQ.

5 1275 Pennsylvania Avenue, N.W.

6 Washington, D.C. 20004

7  
8 On behalf of the Defendant:

9 AMALIA KESSLER, ESQ.

10 U.S. Department of Justice

11 1100 L Street, N.W., Room 10030

12 Washington, D.C. 20530

13 (202) 307-0010

14  
15 On behalf of the Witness:

16 B. MICHAEL RAUH, ESQ

17 JULIE CAMPBELL, ESQ.

18 Mannat, Phelps &amp; Phillips

19 1501 M Street, N.W.

20 Suite 700

21 Washington, D.C. 20005

22  
23 ALSO PRESENT:

24 SHANA GREATMAN, ESQ.

25

Page 4

## 1 PROCEEDINGS

2 Whereupon,

3 NEAL A. McCALEB,

4 business address at Department of the Interior,

5 1849 C Street, N.W., Washington, D.C. 20240, was

6 called as a witness by the Special Master, and

7 having been duly sworn by the Notary Public, was

8 examined and testified as follows:

## 9 EXAMINATION

10 BY MR. BALARAN:

11 Q. Good morning, Mr. McCaleb. First, I'd

12 like to thank you for coming here. I know your

13 schedule is quite pressing and I appreciate the

14 time that you have taken to answer some questions

15 for me. By way of introduction, my name is Alan

16 Balaran. In February of 1999 I was appointed by

17 the Honorable Roy C. Lamberth of the United States

18 District Court for the District of Columbia to the

19 position of special master pursuant to Rule 53 of

20 the Federal Rules of Civil Procedure.

21 At the time, my order of reference

22 encompassed deciding discovery disputes in the

23 case captioned Cobell v. Norton, 96-1285. That

24 order of reference ultimately was expanded in

25 August of 1999 to include oversight over the

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## 1 CONTENTS

2 WITNESS

EXAMINATION BY

3 NEAL A. McCALEB

SPECIAL MASTER

4 By Mr. Balaran

4

## 6 EXHIBITS

7 McCALEB EXHIBIT NO.

FOR IDENTIFICATION

8 1 BIA News Release of 7/2/01 17

9 2 McCarthy letter of 10/16/02 47

10 3 Balaran letter of 10/20/02 57

11 4 McCarthy letter of 11/8/02 68

12 5 McCaleb Declaration of

13 11/19/02 75

14 6 McCaleb Affidavit, unsigned

15 and undated 78

16 7 Interior's Policies on

17 Retaining, Printing and Filing

18 Cobell related e-mail 90

19 8 Court Order of 9/30/02 129

20 9 Deposition Notice of 10/4/02 129

21 10 Document relating to trust

22 management and IIM accounts 147

23

24

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Page 5

1 preservation and retention of all trust documents

2 and records. It's pursuant to that amended order

3 of reference that I have asked you to come here.

4 Okay?

5 A. Yes, sir.

6 Q. As you know, the topic of discussion

7 today will be related to the deletion of e-mails

8 during the ten-month period between December 2001

9 and October 2002. Do you understand that?

10 A. Yes.

11 Q. Okay. As a preliminary matter, as you

12 probably notice, we are not from the same

13 neighborhood and I tend to talk quite quickly. So

14 at any point in time if you don't understand a

15 question, if you want me to back up, if you want

16 me to slow down, I encourage you to please just

17 ask me to do so. I have no problem whatsoever

18 repeating things any number of times until you are

19 absolutely satisfied that you understand the

20 question as posed. Okay?

21 A. Very good.

22 Q. I will, however, assume that if you

23 don't ask me for any clarification whatsoever that

24 you did understand the question, and that I will

25 take your answer as in fact responsive to that

Page 6

1 question. All right?

2 A. That's fine.

3 Q. If you need at any time to take a  
4 break, all you need to do is simply ask. The only  
5 thing I will ask you, however, is that you don't  
6 ask for a break while a question is pending, only  
7 so we keep the integrity of the process and nobody  
8 can come screaming later.

9 A. I understand.

10 Q. Okay. Now this court reporter has been  
11 with me a couple of times, and tends to kick me  
12 under the table if you nod your head one way or  
13 the other, so I'm going to ask you just out of  
14 deference to my shins and knees, that you answer  
15 questions with a yes or no, or as appropriate with  
16 a vocal response.

17 A. All right.

18 Q. Could you tell me where you are  
19 currently employed?

20 A. The Department of Interior of the  
21 United States.

22 Q. And your current position?

23 A. I am the Assistant Secretary of the  
24 Department of Interior for Indian Affairs.

25 Q. And when did you encumber that

Page 8

1 A. Aurene Martin was appointed to that  
2 role as a Presidential appointee.

3 Q. And what is that role exactly?

4 A. She's my chief deputy, and discharges  
5 the discharge of the instructions that I give and  
6 the policies that I provide her.

7 Q. What's the difference between that and  
8 the management functions that Mr. McDivitt  
9 assumes?

10 A. His are primarily administration  
11 functions, whereas Miss Martin is responsible for  
12 working directly with the tribal leaders, advising  
13 me on legal issues relative to a variety of  
14 things, because it is a government-to-government  
15 relationship between the 563 tribes and the United  
16 States government, and they have a vast legal  
17 history, most of them do, so that's a fairly  
18 complex undertaking.

19 Q. And you say that Mr. McCaleb assumes  
20 administrative oversight, is that fair to say?

21 A. Yes.

22 Q. Would that include the budget?

23 A. Yes.

24 Q. What other functions would be subsumed  
25 under Mr. McDivitt's role as administrative

Page 7

1 position?

2 A. I was sworn to that office on July 4th,  
3 2001.

4 Q. Can you tell me what your  
5 responsibilities are as the Assistant Secretary  
6 for Indian Affairs at the Department of Interior?

7 A. Well, the oversight of the Bureau of  
8 Indian Affairs is the primary responsibility,  
9 reporting directly to the Secretary of the  
10 Interior. As an assistant secretary, I'm part of  
11 her office.

12 Q. And who reports to you?

13 A. The Deputy Commissioner of Indian  
14 Affairs, which is the chief operating officer of  
15 the Bureau of Indian Affairs, and the deputy  
16 assistant secretary of Indian affairs. And I  
17 actually have two deputy assistant secretaries;  
18 one is a manager of administration --

19 Q. And who would that person be?

20 A. James McDivitt.

21 Q. And wasn't he in fact in the position  
22 of the acting assistant secretary prior to your  
23 taking over this position in July?

24 A. Yes.

25 Q. Okay. And who else is the other?

Page 9

1 manager?

2 A. Chief information officer. The chief  
3 human resources officer. The chief financial  
4 officer. And then, those are the primary reports,  
5 and then you know, secretaries and miscellaneous  
6 support personnel.

7 Q. Am I to understand you as saying that  
8 Mr. McDivitt is the CFO of the BIA?

9 A. No, the chief financial officer is  
10 Debbie Clark.

11 Q. So when you --

12 A. She reports to Mr. McDivitt.

13 Q. I see. So when you said the CIO and  
14 CHRO and the CFO, you were talking about a chain  
15 of command that reports to him, correct?

16 A. Yes. I understood that to be the  
17 question, and I apologize.

18 Q. Not at all. And the CIO is whom?

19 A. Bryan Burns.

20 Q. And is Mr. Burns in an acting or full  
21 capacity?

22 A. Full capacity.

23 Q. When did he assume his position?

24 A. Late June or early July of 2002.

25 Q. And prior to Mr. Burns assuming the

Page 10

1 position as CIO in July 2002, who had that  
2 position?

3 A. There was an acting, Debbie Clark was  
4 acting, and this was at -- oh, I'm having a senior  
5 moment here.

6 Q. The nice thing is they never get picked  
7 up on the tape, so we can have as many as we like  
8 between the two of us, so not to worry.

9 A. Oh, he actually was gone by the time I  
10 got there.

11 Q. Okay. So Miss Clark at one point was  
12 assuming the dual roles of being the CFO and the  
13 CIO; is that right?

14 A. Yes.

15 Q. Did you pick Mr. Bryan Burns for the  
16 position of CIO?

17 A. I did.

18 Q. Based on what qualifications?

19 A. He had previously been the deputy CIO  
20 at the Department of Health and Human Services,  
21 which is a much larger agency than the Bureau of  
22 Indian Affairs. And also, he dealt with the  
23 Indian Health Service in their information  
24 systems, so he had a frame of reference of Indian  
25 issues. But primarily because of his apparent

Page 12

1 contracted with by --

2 A. Yes, Electronic Data Systems.

3 Q. Just as a matter of procedure, you have  
4 to let me finish the question.

5 A. I'm sorry.

6 Q. Otherwise, that gets him angry also.

7 And EDS is the organization that was contracted by  
8 OST to oversee or report on the status of trust  
9 reform?

10 A. I'll try to tell you my understanding  
11 of why they were employed. In the summer of '01,  
12 they were engaged by the then special trustee at  
13 that time to evaluate the progress that was being  
14 made on the Trust Asset and Accounting Management  
15 System, TAAMS. That employment was expanded to  
16 take a look at all aspects of trust management.

17 Q. And who expanded the scope of their  
18 contract?

19 A. Well, the special trustee did, upon  
20 approval of the Secretary.

21 Q. And isn't it in fact the case that  
22 their reports constitute the quarterly reports to  
23 the Court?

24 A. No, I don't think that's accurate.  
25 They didn't prepare any of the quarterly -- they

Page 11

1 technical knowledge and disposition as a manager.

2 Q. And he reports directly to  
3 Mr. McDivitt?

4 A. We've changed that slightly. He did  
5 report directly to Mr. McDivitt. We're going to  
6 reorganize it to where he reports directly to the  
7 assistant secretary. We have just published a new  
8 reorganization chart, it hasn't been approved by  
9 Congress yet, but he will be the Deputy Assistant  
10 Secretary for Information Resource Management.

11 Q. And who will he report to?

12 A. Me, or to the assistant secretary.

13 Q. I see. Were you the architect of this  
14 reorganization plan?

15 A. I was an active participant in it along  
16 with a number of people, Donna Irvin, who is the  
17 acting special trustee, because the reorganization  
18 was designed to try to integrate these two  
19 activities more closely in keeping with EDS's  
20 recommendations for having a more integrated role  
21 of these two functions under one single executive  
22 sponsor, which in this case will be the deputy  
23 secretary.

24 Q. And when you're referring to EDS,  
25 you're referring to the organization that was

Page 13

1 didn't prepare any information prior to the eighth  
2 report, and the eighth report and the subsequent  
3 reports were primarily prepared by Ross Swimmer,  
4 who is the director of the Office of Indian Trust  
5 Transition.

6 Q. And do you know what information Ross  
7 Swimmer obtained in order to draft those quarterly  
8 reports you're referring to?

9 A. Well, all the participants in the trust  
10 reform process reported to him directly, or  
11 reported to him directly. I'm advised that he did  
12 use many aspects of the EDS report, and in fact  
13 may have incorporated sections of it in their  
14 entirety into the report.

15 Q. Issues related to information  
16 technology are under the supervision of Bryan  
17 Burns; is that correct?

18 A. In the Bureau of Indian Affairs, that's  
19 correct.

20 Q. Okay.

21 A. And the assistant secretaries' offices,  
22 all of them.

23 Q. Let's talk about your office in  
24 particular for a moment. Who is your staff  
25 assistant?

Page 14

1 A. Jean Maybee.

2 Q. And how long has she been your staff  
3 assistant?

4 A. Since I came to the office. She was  
5 there before I came, as the staff assistant to  
6 Sharon Blackwell. The offices are configured in  
7 such a way that her space is between the two  
8 offices and she provided that service when I got  
9 there and I never saw a reason to change.

10 Q. Does she still provide staff assistant  
11 services to Mr. Verdon?

12 A. Yes, but on a more limited basis. She  
13 provides staff assistance now to myself and to  
14 Aurene Martin.

15 Q. Isn't it a fact that Aurene Martin took  
16 over Miss Sharon Blackwell's office?

17 A. Yes.

18 Q. I see. Was that the reason that she is  
19 now servicing both of you?

20 A. Proximity has something to do with it,  
21 yes, I think. Convenience.

22 Q. Okay. Anybody else in terms of your  
23 staff that you can mention, who report to you?

24 A. Well, I think I mentioned Mr. Verdon,  
25 the Deputy Commissioner of Indian Affairs. There

Page 16

1 Q. And do you believe that her  
2 responsibilities for filing the information that  
3 comes to your office are in her job description?

4 A. You know, I have never seen her job  
5 description. I just developed that relationship  
6 with her as we went along, and she seemed ready to  
7 provide those services, and I direct her to do the  
8 filing, send notes and memos, to say file this or  
9 send this, or direct this correspondence to so and  
10 so, and she does so.

11 Q. Is it your happen to send notes and  
12 memos when you want something carried out by Miss  
13 Maybee?

14 A. To the extent that when correspondence  
15 comes in, yes, I will put a sticky on it and say  
16 this goes to Aurene Martin, with a note to her  
17 what I would like her to do. It's really as much  
18 of a note for direction of it and to the people  
19 that I expect to respond.

20 Q. I was just wondering about your general  
21 work habits. It's my work habit to scream and  
22 yell, and I never sort of put anything on paper.

23 A. I'm afraid I'm a screamer myself,  
24 that's the reason I like to have proximity, so  
25 that I can speak up and get a response.

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1 is a Mr. Mike Talley, who is a special assistant  
2 on infrastructure, primarily roads. Those are the  
3 ones that I can think of.

4 Q. Anybody just from an administrative  
5 perspective who helps you with the filing or helps  
6 actually work in the office to make sure that we  
7 have --

8 A. Well, we have -- excuse me, sorry.

9 Q. You understood the question.

10 A. We have two to three people that are in  
11 the foyer of the office that answer the telephones  
12 and see to the, call it housekeeping activities of  
13 the office.

14 Q. What is Miss Maybee's title?

15 A. I don't know that anybody has ever told  
16 me what her title is. I've always referred to her  
17 as administrative assistant.

18 Q. What are the titles of the two or three  
19 individuals in the foyer who answer the  
20 telephones, do you know?

21 A. I don't know.

22 Q. Who's responsible for filing in your  
23 office?

24 A. Jean Maybee for filing the information  
25 that comes from my office.

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1 Q. But from what I'm understanding, you  
2 also, you supplement your screaming with Post-It  
3 notes and other written communications.

4 A. Right.

5 Q. And those communications actually  
6 specify what your instructions are?

7 A. Right, and e-mail of course. If she's  
8 not there at her desk, I will send her an e-mail.

9 Q. Okay. When you first took the  
10 office -- I don't know if you have ever seen this  
11 or not. I'm handing you a document --

12 MR. RAUH: Is that going to be marked  
13 for identification?

14 MR. BALARAN: Yes, we can. I just  
15 don't have any exhibit tabs.

16 MR. RAUH: I think the reporter does.

17 MR. BALARAN: Okay, thanks. Why don't  
18 we mark this as Exhibit 1.

19 (McCaleb Exhibit 1 marked for  
20 identification.)

21 BY MR. BALARAN:

22 Q. This is a document that I pulled of the  
23 web, it's News, U.S. Department of the Interior  
24 Bureau of Indian Affairs, for immediate release,  
25 July 2nd 2001, and the title is, McCaleb Confirmed

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1 as Interior Assistant Secretary for Indian  
2 Affairs, Secretary Norton Lauds Senate's Action.  
3 Have you ever seen this document before?

4 A. Yes, I have.

5 Q. Take a look at it for a moment and tell  
6 me if the statements made in this document are  
7 accurate.

8 A. (Perusing.) To the best of my  
9 knowledge. I really had no previous knowledge of  
10 Mr. McDivitt's service, having not been there.

11 Q. But how about the information relating  
12 to you and your functions, are they accurate?

13 A. Yes, they are.

14 Q. Let me turn you to the second page,  
15 which is noticed page 2 of 2. It states in the  
16 only full paragraph on that page, The Assistant  
17 Secretary-Indian Affairs has responsibility for  
18 fulfilling the Department's trust responsibilities  
19 and promoting self determination on behalf of  
20 tribal governments, American Indians and Alaskan  
21 Natives. The Assistant Secretary is also  
22 responsible for providing services to  
23 approximately 1.4 million American Indians and  
24 Alaskan Natives who are members of the 558  
25 federally recognized tribes. Is that accurate?

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1 with the Office of Special Trustee on a regular  
2 basis as a participant or cochair actually of the  
3 Trust Improvement Management Project, TMIP. And  
4 we coordinated the activities of the participants  
5 in that committee to address the breaches that  
6 were contained in the '99 opinion or decision of  
7 the judge.

8 Q. And when you say we, this is you and  
9 Tom Slonaker?

10 A. That's correct.

11 Q. And Tom Slonaker being the former  
12 special trustee?

13 A. Correct.

14 Q. And when you say that you coordinated,  
15 was this a coordination that was done prior to  
16 every meeting, did you actually discuss the  
17 agenda, and then go in?

18 A. Actually, Tom prepared the agenda.

19 Q. And in what way did you contribute to  
20 the meeting itself?

21 A. Initially my contributions were very  
22 limited, having been there -- not having been  
23 there before. The July contributions were fairly  
24 limited. Early August I began to become more  
25 involved. The last half of August I was on the

Page 19

1 A. It was at the time.

2 Q. Is that no longer accurate?

3 A. Well, a lot of the trust  
4 responsibilities that the previous assistant  
5 secretaries did are now under the direct  
6 supervision of the deputy secretary.

7 Q. When did that change take place?

8 A. I would say between September, October,  
9 November, it was kind of a transition, but it  
10 became fully operable by November of 2001.

11 Q. 2001. So, do I understand that you had  
12 trust responsibility between July 2001 and roughly  
13 November 2001?

14 A. Yes.

15 Q. And between sometime in November 2001,  
16 those responsibilities were taken over by Steven  
17 Griles?

18 A. Many of them under the proposed  
19 reorganization called for the creation of Bureau  
20 of Indian Trust Asset Management. That was  
21 submitted to the Court in mid-November.

22 Q. During the period between July 2001 and  
23 November 2001, what were your responsibilities  
24 vis-a-vis the tribes?

25 A. Well, as the assistant secretary, I met

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1 road. And then beginning in September, the  
2 transition where we were, the going began to  
3 develop and the greater involvement of the deputy  
4 secretary in about that time, Mr. Kayson, the  
5 associate deputy secretary came on board, and we  
6 became very much involved.

7 Q. Can you give me examples of ways that  
8 you became more involved in August of 2001 in the  
9 TMIP meetings?

10 A. Well, the agenda began to mean  
11 something to me. I was, had gotten enough  
12 information and background to be able to ask  
13 pertinent questions and to have some understanding  
14 of the answers, because I had, you know, no  
15 background in terms of the organization and how  
16 things were being done. I had read -- the high  
17 level improvement plan was my only orientation to  
18 the TMIP.

19 Q. But you said you cochaired this. I  
20 have reviewed all the agendas for all the TMIP  
21 steering committee meetings and I have never seen  
22 your name as a cochair. Could you explain that?

23 A. I can't explain it.

24 Q. Have you seen the agendas themselves?  
25 I mean, I can pull them out, I didn't think we'd

Page 22

1 have to, but I can if you'd like. Have you seen  
2 the agendas themselves?

3 A. Yes, I have copies of the agendas which  
4 I attended in my files.

5 Q. Do you have a recollection as to  
6 whether your name was on there as cochair?

7 A. I don't have a recollection. Tom would  
8 always refer to me as a cochair.

9 Q. Did you actually direct the meetings  
10 themselves, did you assist with that?

11 A. Tom directed the meetings.

12 Q. So for instance, if the number of  
13 topics, if there were eight topics to be  
14 discussed, who if anybody decided how long a  
15 specific topic would be discussed?

16 A. That was usually a function of how much  
17 the individual had to offer on the subject. I  
18 can't remember Tom cutting anybody off.

19 Q. What was your relationship with  
20 Mr. Slonaker?

21 A. It was a very positive relationship.  
22 We got along well. There had -- I felt there had  
23 been, or developed a tension between the people  
24 representing the Bureau of Indian Affairs on that  
25 committee and the people representing the Office

Page 23

1 of the Special Trustee, and I felt it was my job  
2 to bring those two organizations into closer  
3 concurrence and teamwork.

4 Q. Can you explain to me what the source  
5 of that tension was between the two organizations?

6 A. Not really. I mean, I tried to ferret  
7 that out as I went along. I think a lot of it  
8 went back to when the Office of Trust Fund  
9 Management was transferred out of the Bureau of  
10 Indian Affairs and into OST. Bureaucracies have a  
11 way of developing, being very territorial about  
12 those kinds of things and I thought, my opinion is  
13 that there was some residual resentment at many  
14 levels within the organization.

15 Q. Were you successful in any  
16 rapprochement in having sort of this concurrence?

17 A. Yes, I think so. Tom and I discussed  
18 the decisions that were made and concurred when we  
19 could, and most of the time we did concur. And we  
20 met privately, he and I, on numerous occasions to  
21 discuss issues that were of mutual concern to us.

22 Q. I'm only going to touch on this for a  
23 few more moments. I realize we're going a bit  
24 afield and I apologize for that, but you've  
25 brought up some facts that were somewhat of some

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1 interest to me, so if counsel can bear with me for  
2 a few minutes. Did you begin attending these  
3 meetings when you first assumed office in July  
4 2001?

5 A. I don't know. I would have to go back  
6 and look, but I think my first meeting I attended  
7 was in late July.

8 Q. And you first took office July 4th, is  
9 that correct?

10 A. That's correct.

11 Q. Are you aware that Miss Blackwell, who  
12 at that time was the Deputy Commissioner for  
13 Indian Affairs had requested assistance, financial  
14 assistance to shore up Interior's computer systems  
15 or BIA's computer systems, for how they were  
16 processing Indian Trust data?

17 A. I became aware of that, yes.

18 Q. How did you become aware of that?

19 A. Because she told me.

20 Q. Are you aware that -- strike that. Do  
21 you know whether or not Miss Blackwell ever went  
22 to a TMIP meeting and requested funding to assist  
23 her in shoring up these systems?

24 A. I don't have a specific memory of that.

25 Q. Do you have any knowledge whether or

Page 25

1 not Miss Blackwell was able to ultimately receive  
2 the funds that she was requesting to shore up  
3 BIA's computer systems that housed and processed  
4 Indian Trust data?

5 A. She received some funds. I don't think  
6 she received the funds to the extent that she  
7 requested them.

8 Q. Did you assist her in her effort to  
9 receive these funds?

10 A. The budget when I arrived, the budget  
11 year was approaching expiration, we were in the  
12 end of the third quarter, and those funds were  
13 committed. We talked about funds for the '03  
14 budget and in fact we did include additional funds  
15 in the '03 budget for the Office of Information  
16 Resource Management.

17 Q. My question was a little different.  
18 Did you assist her in her quest, if you will, to  
19 secure additional funds to shore up BIA's computer  
20 systems?

21 A. I can't recall a specific instance or  
22 activity in which I assisted. My impression, my  
23 general memory is that I was supportive of that  
24 with her.

25 Q. Okay. I'm going to let that go.

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1 You stated there came a time that there  
2 was a transition that went over to Mr. Griles and  
3 Associate Deputy Secretary Mr. Kayson. Can you  
4 tell me what the causes of that transition were,  
5 what led up to that transition?

6 A. Well, I think as Mr. Griles and  
7 Mr. Kayson became more apprised of the  
8 circumstances, they felt, and as EDS's report, I  
9 think EDS report probably was the principal engine  
10 of change.

11 Q. Are you speculating or do you know this  
12 for a fact based on a meeting, something you've  
13 heard or something you have seen in writing?

14 A. Well, I attended numerous meetings with  
15 them and the EDS report, draft copies of the  
16 report were beginning to come in in October, late  
17 September and October, and I attended several  
18 meetings with them along with Tom Slonaker, and  
19 then we began to talk about reorganization and  
20 Mr. Slonaker and myself worked with both  
21 Mr. Griles and Mr. Kayson in that reorganization,  
22 and ultimately both signed off on the proposed  
23 reorganization.

24 Q. My question to you, again, was slightly  
25 different. Can you tell me based on any of the

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1 responsibility, even like education or health or  
2 the Department of Health and Human Services, they  
3 perceive that to be a trust responsibility as an  
4 outgrowth of their treaties and executive orders.

5 Q. Well, let's just for the purposes of  
6 this discussion, then, talk about trust  
7 responsibilities as delineated in the 1994 Trust  
8 Reform Act.

9 A. The fiduciary, can I define those as  
10 fiduciary trust responsibilities? That's how he  
11 we delineate and differentiate.

12 Q. That's fine. Can you tell me what  
13 fiduciary responsibilities were left after this  
14 transition over to Ross Swimmer's group in  
15 approximately October of 2001, the reorganization  
16 that you addressed?

17 A. Yeah. The Bureau of Indian Affairs is  
18 responsible at the agency level where they  
19 actually interface with the individual Indian  
20 money account holders and they are the clerks, if  
21 you please, that service those accounts when they  
22 come in. And to that extent the BIA and therefore  
23 I, were still involved in those activities. But  
24 the control of the organization and the  
25 reorganization were clearly gravitating and did in

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1 meetings that you attended or any documents that  
2 you reviewed why this transition took place? And  
3 I will ask you not to speculate. If you know,  
4 then just tell me.

5 A. I don't have specific knowledge.

6 Q. Well, this is a transition that  
7 basically took, as I understand it, some of the  
8 trust responsibilities away from the BIA and put  
9 them under different auspices, correct?

10 A. That's correct.

11 Q. Okay.

12 A. And as a result of that, a proposed new  
13 reorganization, they created the Office of Indian  
14 Trust Transition.

15 Q. And it's headed by whom?

16 A. Ross Swimmer.

17 Q. Were you left with, the Office of the  
18 Assistant Secretary left with any trust  
19 responsibilities following this transition that  
20 you say took place sometime in August 2001?

21 A. Well, the definition of trust  
22 responsibility is always at issue in Indian  
23 country. Our Indian beneficiaries, especially the  
24 tribes, consider everything that is done by the  
25 Bureau of Indian Affairs to be a trust

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1 fact gravitate to the deputy secretary and to his  
2 assigns or delegee, Mr. Kayson, and Mr. Swimmer.

3 Q. So again, after this transition of  
4 trust responsibilities and again, we will use the  
5 word trust as you defined it, fiduciary  
6 responsibilities, what did BIA have left, what was  
7 left in its quiver of trust responsibilities?

8 A. Education.

9 Q. Now again, I have to ask you, I'm  
10 equating trust with fiduciary responsibilities.

11 A. Oh, I'm sorry.

12 Q. That's quite all right.

13 MR. RAUH: Mr. Balaran, you're asking  
14 from the point of a view of BIA, not from the  
15 point of view of the Indians --

16 MR. BALARAN: Oh, I'm only asking from  
17 your perspective as the Assistant Secretary of  
18 Indian Affairs during this transition period.

19 BY MR. BALARAN:

20 Q. My question, just to repeat it is,  
21 after this transition took place, what  
22 responsibilities were left for BIA vis-a-vis the  
23 beneficiaries for example, or what fiduciary  
24 responsibilities did it now have?

25 MR. RAUH: Vis-a-vis the deputy

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1 secretary's office.  
2 MR. BALARAN: Yes.  
3 BY MR. BALARAN:  
4 Q. That's correct.  
5 A. The leasing of land resources, the  
6 collection of funds from those leases. The  
7 computation of the funds for distribution to the  
8 trustees consistent with the records of  
9 fractionated ownership.  
10 Q. Anything else you can think of?  
11 A. From a fiduciary standpoint, those are  
12 the ones that I think remained.  
13 Q. What was taken away?  
14 A. Well --  
15 Q. And let me make it more clear for the  
16 record. What responsibilities, trust  
17 responsibilities were taken away from the Office  
18 of the Assistant Secretary for Indian Affairs  
19 during the transition you referred to?  
20 A. The management of the information  
21 systems. The data cleanup activities. The  
22 probate, the control of the probate activities;  
23 there are still a lot of detailed probate  
24 activities done by the BIA, but the basic control  
25 and direction of probate. Obviously the actual

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1 disbursement of the funds had long since before I  
2 ever arrived been taken from BIA into the Office  
3 of Trust Fund Management. When they took the  
4 Office of Trust Fund Management into OST, that had  
5 been a BIA function but it had been subsumed by  
6 the Office of Special Trustee, which means all the  
7 funds that were collected by the BIA went to OTFM,  
8 and they were computed and distributed by OTFM to  
9 the recipients.  
10 Q. Anything else that you can recall that  
11 for lack of a better word, that your office was  
12 stripped of?  
13 A. Records is an important issue. This  
14 was before I came also. The records of the  
15 agencies, which were the primary source of the  
16 records, were moved to Albuquerque into their  
17 records section of the Office of Special Trustee.  
18 Q. I guess my question is a little more  
19 focused. I'm asking what responsibilities the  
20 Office of the Assistant Secretary for Indian  
21 Affairs was stripped of as a result of the  
22 transition that took place in August 2001, not  
23 events that took place prior or for other reasons.  
24 MR. RAUH: Again, vis-a-vis the deputy  
25 secretary's office?

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1 BY MR. BALARAN:  
2 Q. Yes, and I would offer some more  
3 questions --  
4 A. I think I previously named them.  
5 Q. Okay. We will assume that all  
6 questions relate to that office.  
7 Who is in charge of insuring the  
8 security of information that resides on the  
9 BIANET?  
10 A. The CIO.  
11 Q. And that would be Mr. Burns?  
12 A. Now it is, yes.  
13 Q. And that would be a function that still  
14 exists within the Office of the Assistant  
15 Secretary for Indian Affairs?  
16 A. Yes. I can remember the previous CIO,  
17 Mr. Dom Nessi was the previous CIO.  
18 Q. The famous Don Nessi?  
19 A. The famous Dom Nessi, yes.  
20 Q. Prior to coming on board in July of  
21 2001, did any of the jobs that you previously had  
22 involve trust or fiduciary responsibilities?  
23 A. No.  
24 Q. And have you taken any courses in trust  
25 or fiduciary law or anything of the sort?

Page 33

1 A. No. My only experience was I served as  
2 a bank board member for several years.  
3 Q. And that bank was what bank?  
4 A. Memorial Bank of Oklahoma City.  
5 Q. What were your functions as a bank  
6 board member?  
7 A. We reviewed loan -- a credit committee  
8 I served on reviewed loan applications and the  
9 oversight of the policies of the bank.  
10 Q. Would trust responsibilities, and when  
11 I talk about trust we're talking about fiduciary  
12 responsibilities, a part of your --  
13 A. We did not have a trust department.  
14 Q. Okay. When you came on board, were you  
15 given the benefit of any classes, any courses, any  
16 training whatsoever in trust?  
17 A. No.  
18 Q. Did anybody sit down with you and go  
19 over the 1994 Trust Reform Act?  
20 A. No.  
21 Q. Have you read it?  
22 A. Yes.  
23 Q. Okay. Do you understand it?  
24 A. I think I do.  
25 Q. You're doing better than I am.



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1 A. Well, it may be attributed to my lack  
2 of understanding.

3 Q. Or mine.

4 A. I did try to acquaint myself with the  
5 Act and with the high level improvement plan that  
6 was designed to address the Court breaches.

7 Q. Was there any formal orientation that  
8 you undertook that went into the high level plan  
9 or went into the 1994 Trust Reform Act?

10 A. No. There may have been some  
11 briefings, but I can't recall them.

12 Q. Did you receive any informal  
13 orientations concerning the high level plan or the  
14 1994 Trust Reform Act, and when I say informal,  
15 not in a classroom setting?

16 A. Discussions, yes. Discussions with  
17 Miss Blackwell, and to a lesser degree,  
18 Mr. McDivitt, those two primarily, and to some  
19 degree I think with representatives of the  
20 solicitor's office.

21 Q. And the representatives of the  
22 solicitor's office gave you an orientation on what  
23 your responsibilities were vis-a-vis the trust?

24 A. Yes, some.

25 Q. What were those responsibilities? What

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1 Q. Did anybody at the Department of  
2 Justice ever inform you of your trust  
3 responsibilities, the fact that you had trust  
4 responsibilities as the assistant secretary?

5 A. No.

6 Q. Did anybody from the Department of  
7 Justice ever tell you what your responsibilities  
8 were, your trust responsibilities as Assistant  
9 Secretary for Indian Affairs?

10 A. Not that I can recall.

11 Q. Would it be a fair characterization to  
12 say that your understanding of what your  
13 responsibilities were as Assistant Secretary for  
14 Indian Affairs sort of came about as on-the-job  
15 training?

16 A. That would be the term that I would  
17 use, yes.

18 Q. Can you tell me what you believe an  
19 Indian Trust record is?

20 A. Well, I believe any record that relates  
21 to the accounting or asset management of a tribe  
22 or individual Indian Money Account holder is such  
23 a record.

24 Q. Okay. And would that include  
25 correspondence?

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1 did they tell you your responsibilities were?

2 MS. KESSLER: Objection. That's  
3 getting into attorney-client communication.

4 MR. BALARAN: I think there is no  
5 attorney-client communication involved if they're  
6 telling you what your responsibilities are to the  
7 trust. It's clearly not work product in the sense  
8 that it's not related to the specificity of  
9 litigation, and I don't think it covers here. I  
10 think the fiduciary exceptions --

11 MS. KESSLER: As long as he doesn't  
12 address litigation.

13 MR. BALARAN: And I'm not, I'm  
14 certainly going to give you a wide berth as far as  
15 any communications you've had with counsel, so let  
16 me go back to my question so we're absolutely  
17 clear.

18 BY MR. BALARAN:

19 Q. What did anybody at the Office of the  
20 Solicitor inform you that your responsibilities as  
21 Assistant Secretary for Indian Affairs, and when I  
22 say responsibilities, I'm referring to trust  
23 responsibilities.

24 A. I don't remember that they did inform  
25 me of any specific responsibilities.

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1 A. It could include correspondence, yes.

2 Q. Could you give me some examples of  
3 documents that you feel would fit your definition?

4 A. A lease, a contract for the sale of  
5 resources like timber or other natural resources  
6 that were inherent from the land. Obviously  
7 financial accounting, correspondence that related  
8 to any financial accounting. And to a degree,  
9 correspondence that related to the high level  
10 improvement plan itself.

11 Q. And how did you come by this  
12 understanding, this definition that you have just  
13 given me?

14 A. I think that's probably intuitive.

15 Q. Did there come a point in time that  
16 anybody from the Office of the Solicitor either in  
17 form or in substance gave you a definition of  
18 Indian Trust records?

19 A. That was discussed at length beginning  
20 in September, because there was --

21 Q. September of what year?

22 A. September of 2001, because there was a  
23 definite divergence of opinion as to what  
24 constituted a trust record between the special  
25 trustee, the tribes themselves, and the Bureau of

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1 Indian Affairs operatives.

2 Q. Let's explore that for a minute. This  
3 divergence of opinion regarding what constituted  
4 an Indian Trust record, are you telling me that  
5 OST had one definition, the tribes had another and  
6 BIA had yet a third?

7 A. I think that's correct.

8 Q. And were these various definitions  
9 somehow memorialized in a writing?

10 A. Yes, they were. As a result of two  
11 nationwide meetings, I think in Albuquerque, and  
12 then the third in Redding, California, there was  
13 developed I think three options for defining what  
14 a trust record was, and actually the special  
15 trustee didn't like any of them.

16 Q. What did he propose?

17 A. That any federal record was a trust  
18 record, which seemed too all inclusive.

19 Q. Is that your opinion?

20 A. Yes, I think so.

21 Q. Did you attend these meetings?

22 A. No, I did not. One of them occurred  
23 before I was sworn in, and I did not attend the  
24 Redding meeting. I had a conflict at the time.

25 Q. Did you review the documents that

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1 Q. Rossman?

2 A. Ken Rossman, I don't know if he was  
3 chair, but he was a principal participant. He  
4 represented OST at the meeting.

5 Q. Do you recall a few moments ago --

6 A. I am told. I was not there.

7 Q. I understand. Do you recall a few  
8 moments ago I asked you what your definition was  
9 of Indian Trust records?

10 A. Uh-huh.

11 Q. Is that a yes?

12 A. Yes, that's a yes.

13 Q. Is that the definition that's currently  
14 employed by the BIA?

15 A. Yes, I think so.

16 Q. Is there a general consensus now of  
17 what constitutes an Indian Trust record to your  
18 knowledge? To your knowledge, is there a general  
19 consensus of what constitutes an Indian Trust  
20 record, a universal definition?

21 A. I think there is -- no, not a universal  
22 definition, that means one that is adopted and  
23 employed by everyone, and no, I don't think there  
24 is a universal one.

25 Q. Well, let me ask you, is there a

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1 emerged from either or both of these meetings that  
2 delineated the various definitions you're giving  
3 me now?

4 A. Yes, I did, the Redding meeting, which  
5 actually listed the three options. I was asked to  
6 concur in the option that we would actually use  
7 for discharging of some of our contracts, the 638  
8 contracts, and compacts wherein tribes were  
9 managing some of these records, and they were the  
10 biggest, had the greatest dissent, because --

11 Q. Dissent from?

12 A. Dissent from the special trustee's  
13 objecting. And in fact there was a decision  
14 reached at the Redding meeting, a consensus which  
15 included the chief of records for the Office of  
16 Special Trustee and the tribal participants, the  
17 BIA participants there essentially had said the  
18 records that we have been keeping are trust  
19 records, the way we have been keeping the records  
20 will be, serve as a definition of trust records,  
21 and Mr. Slonaker rejected that.

22 Q. Was this a meeting that he chaired?

23 A. No, he was not there.

24 Q. Was this a meeting that OST chaired?

25 A. Ken --

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1 definition to your knowledge that has been adopted  
2 by the Office of the Solicitor?

3 A. I don't know the answer to that.

4 Q. Is there a definition to your knowledge  
5 that has been adopted by the Department of  
6 Justice?

7 A. I don't know the answer to that.

8 Q. Is there a definition to your knowledge  
9 that has been adopted by the U.S. Attorney's  
10 office?

11 A. I don't know the answer to that.

12 Q. Have you seen any document, any  
13 correspondence or any other writing from any of  
14 those three organizations wherein a definition of  
15 Indian Trust records was given?

16 A. I have not personally seen one.

17 Q. Is that something that would normally  
18 come across your desk given your position as the  
19 Assistant Secretary of Indian Affairs?

20 A. Yes.

21 Q. What was your position prior to coming  
22 to the Bureau of Indian Affairs, what did you do?

23 A. I was the Secretary of Transportation  
24 for the State of Oklahoma, the Director of  
25 Oklahoma Department of Transportation, and the

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1 Director of the Oklahoma Turnpike Authority.  
2 Q. Didn't you have something key to do  
3 with Amtrak there?  
4 A. It reinstated Amtrak rail service to  
5 Oklahoma City.  
6 Q. And how many years were you involved  
7 with Oklahoma state government?  
8 A. About 20. I served in the legislature  
9 for eight years, served in the term of Henry  
10 Bellman a similar position, Secretary of  
11 Transportation for four years, and served six and  
12 a half years in the Keating administration as  
13 Secretary of Transportation.  
14 Q. My understanding is you had a run for  
15 lieutenant governor; is that correct?  
16 A. That was one of my ill-starred  
17 political voyages.  
18 Q. Did you have a run for governor as  
19 well?  
20 A. I did indeed.  
21 Q. When was that?  
22 A. 1982.  
23 Q. Ready to do it again?  
24 A. No. I am educable.  
25 Q. What kind of e-mail system do you

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1 Q. I wasn't even thinking of manual or  
2 detailed briefing, I was just wondering if --  
3 well, when you came on board, I assume somebody  
4 set up your calendar, correct?  
5 A. Uh-huh.  
6 Q. And I assume somebody set up your  
7 Notes, your Lotus Notes, your e-mail system,  
8 correct?  
9 A. Correct.  
10 Q. Who was that person, do you recall?  
11 A. I don't have specific knowledge. It  
12 appeared on my computer.  
13 Q. Okay.  
14 A. It was my assumption that it was Miss  
15 Maybee in concert with the Office of Information  
16 Management, because all my contact with the Office  
17 of Information Management vis-a-vis my computer  
18 and my personal applications were through her.  
19 Q. Does BIA have an e-mail administrator?  
20 A. I'm sure they do. I don't know who it  
21 is.  
22 Q. So you have not had any contact with  
23 such a person?  
24 A. No.  
25 Q. And when you first came on board, you

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1 currently use in your office?  
2 A. Lotus Notes.  
3 Q. Was Lotus Notes a system that you used  
4 when you were in the Oklahoma state government?  
5 A. No.  
6 Q. What did you use then?  
7 A. We used a Microsoft system.  
8 Q. So is it fair to say that Lotus  
9 Notes -- strike that. Is it fair to say that the  
10 first time you encountered Lotus Notes as an  
11 operator were when you came to the Department of  
12 the Interior?  
13 A. That's correct.  
14 Q. Did you receive any training on Lotus  
15 Notes?  
16 A. No.  
17 Q. Did you ask for any?  
18 A. No.  
19 Q. Is the Lotus Notes system in your view  
20 something --  
21 A. Well, let me back up. I did ask the  
22 Office of Information and Resource Management to  
23 assist me in certain ways. I did not ask for a  
24 manual on Lotus Notes or detailed briefing on how  
25 to use Lotus Notes.

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1 found your system set up, both your calendar, your  
2 notes and your e-mail, correct?  
3 A. That's correct.  
4 Q. Did you have any problems using them?  
5 I just know that I am particularly inept so I'm  
6 just wondering if you share the same disability?  
7 A. Well, from my generation, let's say, I  
8 had only become able to use e-mail in the last  
9 five years probably, well, last six and a half  
10 years.  
11 Q. Okay.  
12 A. And there is a lot about the systems,  
13 even WordPerfect and some of the basic systems,  
14 that I am not proficient at.  
15 Q. Have you ever had occasion during your  
16 tenure as assistant secretary to call somebody up  
17 to ask a question regarding a problem you have  
18 encountered with Louts Notes or your e-mail  
19 system?  
20 A. Yes.  
21 Q. Can you give me an example?  
22 A. Yesterday I couldn't get into the  
23 system because my password didn't work.  
24 Q. And who did you call?  
25 A. A guy by the name of Clarence, that's

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1 in the Bureau there, that looks after my computer.  
2 Or I has Miss Maybee call Clarence.  
3 Q. And do you know Clarence's last name?  
4 A. No, I don't.  
5 Q. Do you know what his title is?  
6 A. No, I don't.  
7 Q. Can you give me another instance where  
8 you had to ask for some assistance?  
9 A. Well, that has happened several times.  
10 Q. When you say several times, are you  
11 talking about the fact that you couldn't get in  
12 with your password?  
13 A. Yes.  
14 Q. Have you had any other difficulties  
15 with your e-mail system?  
16 A. There is some extraneous pop-ups that  
17 are an attendant part of Lotus Notes that I don't  
18 use, and I asked them to take it off yesterday.  
19 Q. That was yesterday?  
20 A. Yeah.  
21 Q. You are familiar with how to send a  
22 message?  
23 A. Yes.  
24 Q. You're familiar with how to receive a  
25 message?

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1 A. Yes.  
2 Q. You're familiar with how to delete a  
3 message?  
4 A. Yes. I became familiar with how to  
5 delete a message.  
6 Q. Okay. Do you want to take a break?  
7 A. I'm fine.  
8 MR. BALARAN: Okay. Let's mark this as  
9 Exhibit 2.  
10 (McCaleb Exhibit 2 marked for  
11 identification.)  
12 BY MR. BALARAN:  
13 Q. Mr. McCaleb, I'm showing you a document  
14 labeled Exhibit 2. It's a copy of a letter, the  
15 letterhead the United States Department of the  
16 Interior, Office of the Solicitor, Washington,  
17 D.C., dated October 16, 2002, and it's a facsimile  
18 transmission to Peter Miller of the United States  
19 Department of Justice Civil Division, Commercial  
20 Litigation Branch, and it's signed on page 2 by  
21 Sabrina McCarthy. Have you seen this letter?  
22 A. Yes.  
23 Q. When did you first see this letter?  
24 A. I don't remember the specific date;  
25 fairly soon after it was prepared.

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1 Q. Did you see this letter before it  
2 actually went out?  
3 A. No.  
4 Q. You saw this letter only after it went  
5 out?  
6 A. Yes.  
7 Q. Did anybody consult you concerning the  
8 contents of this letter?  
9 MR. RAUH: Objection. Just give me one  
10 second. You can answer his question without  
11 divulging any conversations you had with counsel.  
12 BY MR. BALARAN:  
13 Q. Yes, I will not ask you -- if anything  
14 comes up with your conversations with private  
15 counsel, please let me know that I'm going into  
16 that territory and we can have that discussion.  
17 Okay, Mr. McCaleb?  
18 A. Let me reread this.  
19 Q. No. I just need to sort of --  
20 A. I understood your instruction.  
21 Q. Okay, very good.  
22 A. (Perusing.)  
23 Q. Let me just ask you, you appear to be  
24 consulting your calendar; is that correct?  
25 A. Yes.

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1 Q. For what purpose, may I ask?  
2 A. Because I left after October 10th when  
3 the problem became apparent to me, in my  
4 conversations with Miss Maybee, and I think I was  
5 gone the entire following week. I remember the  
6 discussions after the letter was sent and I was  
7 looking at the calendar to see if I was in town at  
8 anytime before this October 16th date, and I don't  
9 think I was.  
10 Q. So you were in town for the October  
11 10th conversation with Miss Maybee, which we will  
12 discuss in a moment; is that correct?  
13 A. Correct.  
14 Q. When did you leave town?  
15 A. I think the next day. Yeah, the 11th,  
16 right, that would be right.  
17 Q. Okay. And when did you return?  
18 A. I'm not sure. I think I spend most of  
19 -- I would have to go back and consult my  
20 calendar, but I think I spend most of that week on  
21 the road. I spend about half of my time on the  
22 road away from the office.  
23 Q. Okay. So in response to my question,  
24 you did not review this letter prior to it being  
25 sent from Miss McCarthy at the Solicitor's office

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1 to Mr. Miller at the Department of Justice?  
2 A. I don't think so. I wasn't in town.  
3 The only way I would have been able to have  
4 reviewed it is if they faxed it to me at my hotel  
5 and that may have occurred, I just don't remember.  
6 Q. Where were you staying, do you recall?  
7 A. I would have to go back and look at my  
8 calendar to see where I was going. I mean, I'm on  
9 the road half the time and I usually make several  
10 visits at different tribal headquarters and  
11 locations when I'm gone, and so I don't remember.  
12 Q. Let me understand the time line then.  
13 You have a conversation with Miss Maybee on  
14 October 10th, correct?  
15 A. Correct.  
16 Q. And does there come a point in time  
17 before October 16th that you have a conversation  
18 with the Office of the Solicitor regarding the  
19 events that are discussed in this letter?  
20 A. Let me consult my calendar here and see  
21 if I --  
22 Q. This is the second calendar?  
23 A. Yeah, this is a Palm Pilot obviously.  
24 Again, on the 16th I was in Denver.  
25 Q. Where were you on the 11th?

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1 A. I was en route.  
2 Q. I see. You were en route to Denver?  
3 A. I had two meetings at that time. One  
4 was a meeting with the Council of Energy Resource  
5 Tribes in Denver and the next meeting was with the  
6 Indian Trust Monitoring Association.  
7 Q. And that was again in Denver?  
8 A. Yes. And then I went from there on to  
9 Oklahoma.  
10 Q. And what date was that?  
11 A. The 17th, that was a travel day.  
12 Q. Let's focus our attention on the time  
13 between October 11th and October 16th, if we may,  
14 okay?  
15 A. Okay.  
16 Q. At that time you testified that you  
17 were in Denver, Colorado, correct?  
18 A. That's correct.  
19 Q. Did there come a point in time between  
20 October 11th and October 16th that you had a  
21 discussion with the Office of the Solicitor  
22 regarding the events contained in the letter that  
23 is now before you as Exhibit 2?  
24 A. I don't remember. I really don't  
25 remember.

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1 Q. Well, can you tell me how the facts  
2 that are contained in this letter came out, do you  
3 know?  
4 A. I would be assuming. I do not know.  
5 Q. Well, assume them.  
6 MR. RAUH: Now you're clearly asking  
7 him to speculate.  
8 MR. BALARAN: Yes, I am, and I will  
9 accept his answer as a speculation.  
10 THE WITNESS: I'm speculating that  
11 there was a discussion with Miss Martin or the  
12 chief of staff, Mr. Jerry Gidner.  
13 BY MR. BALARAN:  
14 Q. Who is Miss Martin?  
15 A. Aurene Martin, the Deputy Assistant  
16 Secretary.  
17 Q. And who would have had such a  
18 conversation?  
19 MR. RAUH: Again, you're asking him to  
20 speculate?  
21 MR. BALARAN: Yes, I am.  
22 THE WITNESS: I don't know. I'm told  
23 this was brought to the attention of the associate  
24 deputy secretary early the following week after  
25 the 10th, like on the 12th or the 13th. I don't

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1 know that specifically.  
2 BY MR. BALARAN:  
3 Q. Who told you that?  
4 A. The chief of staff, Mr. Jerry Gidner.  
5 Q. Just so I understand the chronology, on  
6 October 10th you discovered that your e-mails are  
7 deleted; is that correct?  
8 A. Yes. I knew they were deleted. I  
9 thought they had been saved.  
10 Q. Okay. We can go into the details of  
11 that in a moment, but October 10th is the date  
12 that you discovered that your e-mails had been  
13 deleted; is that correct?  
14 A. No. I knew they had been deleted.  
15 That was the date I discovered that they had not  
16 been saved.  
17 Q. When did you first find out that they  
18 had been deleted?  
19 A. Well, I was deleting them, so I knew  
20 they were being deleted.  
21 Q. Had anybody else deleted your e-mails?  
22 A. I don't know.  
23 Q. Who else has access to your e-mails?  
24 A. Jean Maybee.  
25 Q. Have you ever given instruction to Miss

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1 Maybee to delete your e-mails?

2 A. No.

3 Q. Okay. Let's go back to October 10th.  
4 October 10th you find out that your e-mails have  
5 not been saved; is that correct?

6 A. Correct.

7 Q. Did you talk to anybody about this  
8 besides Miss Maybee?

9 A. No. I gave her some specific  
10 instructions to contact the Office of Information  
11 Resource Management and to recover the e-mails  
12 from them.

13 Q. Why the Office of Information Resource  
14 Management and not the e-mail administrator over  
15 at the BIA?

16 A. Because I thought the OIRM would have  
17 the backup tapes, that's what I had been led to  
18 believe.

19 Q. And who told you that?

20 A. I can't give you a name. That is the  
21 impression that I had from -- that's the  
22 impression I had.

23 Q. And you told her to go to OIRM  
24 specifically; is that correct?

25 A. Right. Specifically, we were getting

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1 Q. And I'm asking you a different  
2 question. I'm asking you if you instructed Miss  
3 Maybee or anybody else at any time to reconstitute  
4 or go to the backup tapes to get the information  
5 that you deleted that was Cobell related.

6 A. Not until I returned, and then I  
7 discussed it with Mr. Kayson.

8 Q. Was this in a private meeting with  
9 Mr. Kayson?

10 A. I think so.

11 Q. And did you ask Mr. Kayson to see if  
12 the information that you had deleted that was  
13 Cobell related and not OIRM morning reports, did  
14 you ask him to see if they could be taken off the  
15 backup tapes?

16 A. I think he told me that he thought they  
17 could be.

18 Q. How did he find out about it, do you  
19 know?

20 A. The issue had been raised in his office  
21 by the chief of staff, Mr. Jerry Gidner.

22 Q. And how did Jerry Gidner know, if you  
23 were away during this time?

24 A. Miss Maybee raised the issue with him.

25 Q. Is the information contained in this

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1 daily reports from OIRM on the amount of money  
2 disbursed to IIM account holders pursuant to the  
3 shutdown that had occurred in December, whereby  
4 IIM account holders were unable to receive their  
5 monthly distributions, and so we started keeping  
6 -- I asked for a report to be given to me on a  
7 daily basis so I could see when we instituted a  
8 method of paying out some of the mineral leases  
9 based upon estimates from previous month's payout,  
10 so I could see how much money was getting into the  
11 hands of the IIM account holders. And I never  
12 stopped that coming in.

13 Q. Did you delete the OIRM morning  
14 reports?

15 A. I did.

16 Q. Did you delete any other incoming  
17 e-mail?

18 A. Yes.

19 Q. Did you delete any other incoming  
20 Cobell e-mail?

21 A. Probably.

22 Q. Did you ask Miss Maybee to call OIRM to  
23 get a copy of those?

24 A. I asked her specifically to get the  
25 morning reports.

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1 October 16, 2002 letter that's Exhibit 2, is it  
2 accurate?

3 A. To the best of my knowledge it is.

4 Q. Reviewing it now, would you change  
5 anything in it?

6 A. No.

7 Q. Okay.

8 (McCaleb Exhibit 3 marked for  
9 identification.)

10 BY MR. BALARAN:

11 Q. I'm showing you a copy of a letter  
12 generated by my office on October 20, 2002 to  
13 Peter Miller at the Department of Justice, the  
14 caption being e-mail message of Assistant  
15 Secretary-Indian Affairs. It is a two-page letter  
16 and I would like you to take a moment and review  
17 this letter and tell me whether you have seen it  
18 before.

19 A. (Perusing.)

20 Q. My question to you again, have you seen  
21 this letter before?

22 A. Yes.

23 Q. And where have you seen it?

24 A. It was presented to me, I think shortly  
25 after the date.

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1 Q. By whom?  
2 A. I think Miss McCarthy.  
3 Q. When you say you think Miss McCarthy,  
4 could it have been someone else who gave this to  
5 you?  
6 MR. RAUH: Objection, speculative.  
7 MR. BALARAN: Yes, exactly.  
8 BY MR. BALARAN:  
9 Q. Could it have been anyone else?  
10 A. It could have been.  
11 Q. Who else could it have been?  
12 A. It could have been Miss Martin.  
13 Q. Miss Martin gave you my letter?  
14 A. I don't know. I didn't say that, I  
15 said it could have been. I suspect that the  
16 letter was circulated to her in my absence.  
17 Q. Who else might it have been besides  
18 Miss McCarthy or Miss Martin?  
19 A. I don't know. I mean, that would be  
20 reaching further than I am willing to do.  
21 Q. Okay. So the likely contenders are  
22 Miss McCarthy as a first and Miss Martin as a  
23 second; is that right?  
24 A. Right.  
25 Q. Did you discuss the contents of this

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1 secretary, administrative assistant, and had them  
2 sort of type up your notes.  
3 A. No.  
4 Q. Did you take any notes that, in  
5 response, in preparing for your responses to this  
6 letter?  
7 A. No.  
8 Q. Did you consult any documents?  
9 A. Well, yes, I went to see what e-mail I  
10 still had, and by that time we had received from  
11 OIRM all the daily reports that we had asked for,  
12 printed copies of all the daily reports, so I took  
13 a rough inventory of what we had, which was almost  
14 all the sent e-mail and all the daily reports, and  
15 substantial portions of other Cobell related  
16 e-mail over that period of time.  
17 Q. So you were looking not just at the  
18 OIRM morning reports but at other Cobell related  
19 e-mails that might have been deleted; is that  
20 correct?  
21 A. I asked Mrs. Maybee to give me a copy  
22 of any and all Cobell related e-mail that she had  
23 access to in her files.  
24 Q. What constitutes a Cobell related  
25 e-mail?

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1 letter with anybody?  
2 A. When I discussed it with Miss McCarthy,  
3 yes.  
4 Q. On how many occasions?  
5 A. Probably two.  
6 Q. Were you asked to draft a response to  
7 this letter?  
8 A. Yes.  
9 Q. Did you in fact do so?  
10 A. I counseled with Mrs. McCarthy and she  
11 drafted a response from our conversations.  
12 Q. When you say you counseled with her,  
13 does that mean that you actually met with her and  
14 gave her the responses orally?  
15 A. Yes.  
16 Q. Did there come a point in time when you  
17 generated a written response to this either in  
18 draft or final form?  
19 A. That I personally did, no.  
20 Q. Did you direct anybody else to draft  
21 your responses in writing, aside from Miss  
22 McCarthy?  
23 A. No. I was told that Mrs. McCarthy was  
24 preparing the response.  
25 Q. I'm just asking if you went to a

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1 A. Well, one that has to do either with  
2 the litigation itself, with the IIM account  
3 holders, with the -- there's three primary ones  
4 that I don't --  
5 Q. Are you referring to the three  
6 functional areas?  
7 A. Yes.  
8 Q. Do you have a list of those three  
9 functional areas on your desk somewhere --  
10 A. I think so.  
11 Q. Please let me finish the question. Do  
12 you have a list of the three functional areas that  
13 you're supposed to keep that are Cobell related on  
14 your desk somewhere?  
15 A. Yes, I do.  
16 Q. Where do you keep them?  
17 A. In my desk file.  
18 Q. What is the proper procedure for  
19 e-mails in your office? What is the proper  
20 procedure for printing, saving, filing and  
21 archiving, can you tell me?  
22 A. My impression was the proper procedure  
23 was that the e-mails that I was doing, that I was  
24 sending, were being archived by Miss Maybee.  
25 Q. And I'm going to stop you and I'm going

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1 to say that's not responsive, because I want you  
2 to listen to my question very carefully. I'm  
3 going to ask you first, does the Department of The  
4 Interior have a policy regarding the saving,  
5 filing, archiving and deleting of e-mails?

6 A. Well, they have published numerous  
7 instructions in both printed letters and e-mails.

8 Q. And would you consider those numerous  
9 instructions in letters and e-mails the Department  
10 policy vis-a-vis the retention, preservation,  
11 archiving and deleting of e-mails?

12 A. Yes.

13 Q. What is that policy? And I'm not  
14 asking with regard to you -- and this may be your  
15 impression. What is that policy?

16 A. That you don't delete any e-mails, that  
17 you keep a record of all the e-mails before they  
18 are deleted.

19 Q. And what type of record are we  
20 referring to?

21 A. Well, I think the written requirement  
22 is that they be printed, hard copy printed.

23 Q. Did you print these e-mails before  
24 deleting them?

25 A. No, sir, I did not.

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1 recoverable?

2 A. No.

3 Q. What does the policy say?

4 A. I can't quote it to you, I just told  
5 you generally what my impression was.

6 Q. Would you believe me if I told you that  
7 the policy says that you must print them before  
8 deleting them?

9 A. Yes, I would.

10 Q. Did you do so with the OIRM morning  
11 reports?

12 A. No.

13 Q. Isn't it in fact true, sir, that Miss  
14 Maybee could not have opened up the OIRM morning  
15 reports?

16 A. Well, they were encrypted. I only  
17 found that out recently.

18 Q. When did you first start getting OIRM  
19 morning reports?

20 A. In January of 2002.

21 Q. When did you find out that they were  
22 encrypted?

23 A. Last week.

24 Q. So, am I to understand that you didn't  
25 read them?

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1 Q. Did you believe that Miss Maybee was  
2 printing these e-mails before they were deleted?

3 A. I did not know.

4 Q. Well, let me ask you, sir, the OIRM  
5 morning reports were deleted, direct?

6 A. Yes.

7 Q. And you deleted them; is that right?

8 A. Yes.

9 Q. And you believe Miss Maybee was  
10 printing them out?

11 A. No, I do not.

12 Q. So in fact when you deleted them  
13 without printing them out, you were in violation  
14 of Interior policy regarding e-mails; is that  
15 correct?

16 MR. RAUH: Objection. You're calling  
17 for a legal conclusion.

18 MR. BALARAN: That's fine.

19 BY MR. BALARAN:

20 Q. To the extent that you understand what  
21 the policy is, I'm entitled to your answer.

22 A. I thought they were recoverable and in  
23 fact were, or had been recovered.

24 Q. Does Interior policy say that you are  
25 not to print them out if you believe that they are

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1 A. I did read them. Well, I asked for  
2 them so that I would be current on how many  
3 payments were made and how current we were with  
4 our IIM account holders. When we reached a level  
5 of currency, frankly, I quit reading them because  
6 they had served their interest.

7 Q. But when you first started reading  
8 them, were they encrypted?

9 A. I don't have any idea.

10 Q. Well, you just told me they were  
11 encrypted, I didn't.

12 A. Well, I'm told they were encrypted.

13 Q. Do you know the process for  
14 unencrypting?

15 A. No, I do not.

16 Q. Did you ever instruct Miss Maybee to  
17 unencrypt your e-mails?

18 A. No, I did not.

19 Q. Let's go back to the October 20th, 2002  
20 letter which I believe is Exhibit 3.

21 A. October 20th, yes.

22 Q. And you have had the opportunity to  
23 review that?

24 A. Yes.

25 Q. And that's a fair representation of the



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1 letter that you saw?

2 A. Yes.

3 Q. Okay. You stated, I believe, and  
4 correct me if I'm wrong, that you consulted with  
5 Miss McCarthy prior to this letter being  
6 generated, correct?

7 A. Yes.

8 Q. And you also testified, I believe, that  
9 you did not put anything down in writing to  
10 memorialize any of the answers in writing; is that  
11 correct?

12 MS. KESSLER: Which letter are we  
13 talking about?

14 THE WITNESS: Yeah, I'm confused about  
15 which letter. She wrote the letter of October  
16 16th, and I was not familiar with the letter of  
17 October 20th, which is your letter, sir.

18 BY MR. BALARAN:

19 Q. I'm sorry, I apologize. Yes, the  
20 October 20th letter, I'm referring to that. Did  
21 you consult with Miss McCarthy regarding the  
22 response to this letter?

23 MR. RAUH: That's a different question.

24 MR. BALARAN: I apologize for that.

25 THE WITNESS: Yes, I did.

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1 letter?

2 A. Yes.

3 Q. And how long did each of these meetings  
4 last?

5 A. I don't have a specific recollection.

6 I would say the first one was probably more  
7 lengthy, maybe a half an hour, and the second one  
8 was more abbreviated, maybe 15 minutes.

9 Q. Okay. And did Miss McCarthy take notes  
10 while you were discussing this?

11 A. Yes.

12 Q. Did you review the questions that I had  
13 asked?

14 A. Yes.

15 Q. And did you give your responses to  
16 those questions?

17 A. Yes.

18 Q. Did there come a point in time when  
19 Miss McCarthy responded to this?

20 A. Yes.

21 (McCaleb Exhibit 4 marked for  
22 identification.)

23 BY MR. BALARAN:

24 Q. In front of you, sir, is a November 8,  
25 2002 letter with the caption United States

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1 BY MR. BALARAN:

2 Q. Okay. And you testified, just to go  
3 back over this, you testified that you did not  
4 memorialize any of your responses to this letter  
5 in writing; is that correct?

6 A. No.

7 Q. And on how many occasions did you --

8 MR. RAUH: Wait, wait, wait. You asked  
9 a double negative question there. Do you want to  
10 repeat that question? I don't think the witness  
11 understood it.

12 THE REPORTER: "Question: And you did  
13 not memorialize any of your responses to this  
14 letter in writing; is that correct? Answer: No."

15 THE WITNESS: I did not memorialize it.

16 BY MR. BALARAN:

17 Q. Okay. You understood the question?

18 A. Yes.

19 Q. And your answer is still no?

20 A. Yes.

21 Q. On how many occasions did you meet with  
22 Miss McCarthy regarding the response to this  
23 letter?

24 A. Two that I can recall.

25 Q. In response to the October 20th, 2002

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1 Department of the Interior Office of the  
2 Solicitor, a facsimile transmission from Miss  
3 Sabrina McCarthy of the Office of the Solicitor to  
4 Peter B. Miller at the Department of Justice. The  
5 letter is four pages in length and I would like  
6 you to take a moment and review it and tell me if  
7 you have ever seen this letter before.

8 A. (Perusing.)

9 Q. Have you seen this letter before?

10 A. Yes, I have.

11 Q. When did you see this letter?

12 A. I don't have a specific recollection of  
13 the date, but I think after it was, shortly after  
14 it was written and before it was transmitted, I  
15 had an opportunity to review the letter.

16 Q. After it was transmitted?

17 A. No, before.

18 Q. Okay. How many drafts did you review,  
19 if any?

20 A. Oh, more than one. I don't remember a  
21 specific number.

22 Q. How were the draft or drafts sent to  
23 you?

24 A. Hand-delivered.

25 Q. By whom?

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1 A. Sabrina, I assume. I wasn't there when  
2 she delivered them. I received them in my in  
3 basket.

4 Q. Did you make comments?

5 A. Well, the first letter had a lot of  
6 blanks in it because she didn't have the  
7 information and I tried to provide her the  
8 information.

9 Q. So you filled in the blanks?

10 A. Uh-huh.

11 Q. And you did that in writing?

12 A. Yeah.

13 Q. Okay. So I asked you prior whether or  
14 not you memorialized -- let me just finish the  
15 question please -- memorialized any of your  
16 answers at all, either in notes or in final form  
17 in writing, and I'm going to ask you to please  
18 reconsider your answer.

19 MR. RAUH: Counsel, that was a  
20 different letter.

21 MR. BALARAN: That's fine.

22 THE WITNESS: I'm not sure that I  
23 filled in the blanks. Sabrina and I sat down and  
24 went over the letter, and I may have given her the  
25 instructions verbally, and I may have written them

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1 meetings did you go over these multiple drafts?

2 A. Well, I think there was only two  
3 drafts, I'm not sure, but I think there was only  
4 two.

5 Q. Okay. So did you --

6 A. The one with the blanks in it and then  
7 a final draft.

8 Q. So am I to understand that you went  
9 over the -- in your first longer meeting that may  
10 have been up to an hour, that's when you went over  
11 the first draft?

12 A. No. The first meeting was when we  
13 discussed the content and I communicated to her my  
14 answers. Then she prepared a draft that had some  
15 blanks in it, and then we discussed that.

16 Q. That was the second meeting?

17 A. Yes.

18 Q. And that was the first draft?

19 A. Yes.

20 Q. Did you see a second draft?

21 A. No, I think I just saw the one with the  
22 blanks.

23 Q. Oh, so there was only one draft that  
24 you saw now?

25 A. Mr. Balaran, I didn't intend to

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1 down. I didn't keep a copy. If I did write them  
2 down, I gave them to Sabrina. She and I talked  
3 about it, we had an understanding about what the  
4 content of the letter was to be, but whether it  
5 was in writing, I don't really specifically  
6 recall.

7 BY MR. BALARAN:

8 Q. And do you recall one or two drafts?

9 A. More than one.

10 Q. So let me understand. You had two  
11 meetings, you testified, do you recall, with  
12 regards to a response to my letter?

13 A. Uh-huh.

14 Q. You had one that was a half hour that  
15 you described, I believe, as the longer of the  
16 meetings, correct?

17 A. Yes.

18 Q. And then you had a second meeting that  
19 I believe was shorter, that ran approximately 15  
20 minutes, correct?

21 A. Yes. Those time intervals are not  
22 necessarily accurate; I'm just trying to delineate  
23 that one was longer than the other, and less than  
24 an hour.

25 Q. Okay. Then during which of these

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1 indicate I saw multiple drafts. I said we had two  
2 meetings. I gave her the information to fill in  
3 my response to the questions, she prepared a draft  
4 that was not complete. I provided that  
5 information and she prepared a final draft. There  
6 may have been a third meeting. I don't have a  
7 specific --

8 Q. Who keeps your calendar of your  
9 appointments?

10 A. Miss Maybee.

11 Q. Would she keep a calendar of  
12 appointments that you have with Office of the  
13 Solicitor as a general rule?

14 A. As a general rule, unless they came in  
15 without an appointment and wanted to speak with  
16 me.

17 Q. Do you recall whether or not these  
18 appointments with Sabrina McCarthy were scheduled  
19 or unscheduled?

20 A. The first one was scheduled.

21 Q. And the second?

22 A. I don't recall.

23 Q. Okay.

24 MR. BALARAN: I'm going to put you on  
25 record that I'm going to ask for a copy of your

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1 calendar for that month so we can -- this is  
2 directed at DOJ, right.  
3 BY MR. BALARAN:  
4 Q. Just so I understand, and perhaps this  
5 is my confusion, how many drafts of this letter do  
6 you recall seeing?  
7 A. I can only recall the first draft with  
8 the blanks in it, before this document here.  
9 Q. Are the responses in this document  
10 accurate?  
11 A. Yes.  
12 Q. Do you know who, if anybody else, Miss  
13 McCarthy consulted in drafting the responses in  
14 this November 8th fax?  
15 A. I have no knowledge of that.  
16 Q. Do you know if she talked to Miss  
17 Maybee?  
18 A. I have no knowledge of that.  
19 Q. Did there come a point in time that you  
20 drafted an affidavit regarding the destruction of  
21 e-mails that took place during the ten-month  
22 period between December 2001 and October 2002?  
23 A. The question is?  
24 Q. Did there come a point in time that you  
25 drafted an affidavit concerning the destruction of

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1 A. Yes, they are.  
2 Q. Did you prepare this declaration?  
3 A. I didn't personally have it typed. I  
4 consulted in the preparation of the document,  
5 provided the factual information.  
6 Q. Who did you consult with?  
7 MR. RAUH: Objection. You can answer  
8 that so long as it doesn't involve conversations  
9 with Miss Campbell or myself.  
10 MR. BALARAN: Well, he can say if he  
11 consulted with you. I certainly wouldn't ask the  
12 content of it.  
13 MR. RAUH: Then that's fine.  
14 BY MR. BALARAN:  
15 Q. I just asked with whom you consulted.  
16 A. Mr. Rauh and Miss Campbell.  
17 Q. Did you consult with the Office of the  
18 Solicitor?  
19 A. No.  
20 Q. Were you made aware of the fact that at  
21 one point in time I asked for a declaration or  
22 affidavit from you attesting to the truth of the  
23 statements contained in Miss McCarthy's letter  
24 dated November 8, 2002?  
25 A. No, I was not.

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1 e-mails?  
2 A. Yes.  
3 MR. BALARAN: Is that unclear.  
4 MR. RAUH: I think it was a  
5 declaration, but that may be a distinction without  
6 a difference.  
7 MR. BALARAN: Okay.  
8 (McCaleb Exhibit 5 marked for  
9 identification.)  
10 MR. BALARAN: Let's go off the record  
11 for a second.  
12 (Off the record discussion.)  
13 BY MR. BALARAN:  
14 Q. I have just presented you with  
15 Exhibit 5, the legend of which is Declaration of  
16 Assistant Secretary Neal A. McCaleb. I would like  
17 you to look at this document and tell me if you've  
18 ever seen it before.  
19 A. Yes.  
20 Q. Is this in fact your declaration  
21 concerning the events surrounding the destruction  
22 of e-mails during the ten-month period?  
23 A. Yes, it is.  
24 Q. Are the statements in here true and  
25 accurate?

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1 Q. Then what were the circumstances under  
2 which you created this declaration?  
3 A. I thought it would be useful, in  
4 consultation with my counsel, to set down the  
5 circumstances as I remembered them.  
6 Q. So you came about this on your own; is  
7 that correct?  
8 A. Yes, in consultation with my counsel.  
9 Q. I understand. How many drafts of this  
10 declaration did you go through?  
11 A. I only remember one draft.  
12 Q. Isn't it in fact true that a draft  
13 affidavit was prepared for your signature at one  
14 point in time?  
15 A. Yes, there was.  
16 Q. Who prepared that?  
17 A. Miss Martin.  
18 Q. Okay. And is Miss Martin an attorney?  
19 A. Yes.  
20 Q. Is Miss Martin your counsel?  
21 A. She was at one time General Counsel for  
22 the Assistant Secretary. She is not General  
23 Counsel now.  
24 Q. When she prepared the draft affidavit  
25 that I just referred to, did she do this in her

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1 capacity as General Counsel?  
2 A. No, she is not General Counsel.  
3 Q. I understand but I just want to be  
4 absolutely sure because you did state that at one  
5 point she acted as General Counsel.  
6 A. Correct.  
7 Q. And my question to you again, this  
8 draft affidavit that I refer to, did she prepare  
9 it in her capacity as General Counsel?  
10 A. Sir, I don't know what capacity she  
11 prepared it in. I didn't ask for it and I didn't  
12 sign it.  
13 Q. Did you review it?  
14 A. Yes, I read it.  
15 Q. Okay. Do you have any idea what  
16 inspired her to create such a document?  
17 A. No.  
18 (McCaleb Exhibit 6 marked for  
19 identification.)  
20 BY MR. BALARAN:  
21 Q. I'm handing you a document that simply  
22 contains the legend affidavit on top. It's a  
23 two-page document that has 13 paragraphs with a  
24 signature line and a notary block on the bottom.  
25 Take a moment and look at this and I will ask you

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1 if you have ever seen Exhibit 6 before.  
2 A. Okay.  
3 Q. And my question is, have you ever seen  
4 this document with the legend affidavit on the  
5 top, that I have had give you as Exhibit 6?  
6 A. I have.  
7 Q. Is that the document that you referred  
8 to before as being the one given to you by Aurene  
9 Martin?  
10 A. Yes.  
11 Q. Can you tell me the circumstances under  
12 which Miss Martin gave you this document?  
13 A. When I returned from my trip following  
14 about the 20th of October, she provided me with  
15 this document.  
16 Q. She just came into your office and said  
17 Mr. McCaleb, sign it?  
18 A. No, she didn't. She presented it to me  
19 for my consideration.  
20 Q. Did you instruct her to create such a  
21 document?  
22 A. No, I did not.  
23 Q. Did you ask her to create such a  
24 document?  
25 A. No, I did not.

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1 Q. Do you know if anybody did?  
2 A. I have no knowledge of that.  
3 Q. Did you ask her what this was?  
4 A. I knew what it was, it's an affidavit.  
5 Q. Well, had she prepared any other  
6 affidavits for you since you have been Assistant  
7 Secretary at the Department of the Interior?  
8 A. No.  
9 Q. So this is the first affidavit, is that  
10 correct?  
11 A. That's correct.  
12 Q. Has she prepared any other legal  
13 documents for you since you have been assistant  
14 secretary?  
15 A. Yes.  
16 Q. What other legal documents has she  
17 prepared?  
18 A. Well, in her role as General Counsel,  
19 she prepared a great many legal documents.  
20 Q. But how about when she wasn't General  
21 Counsel, did she prepare any legal documents for  
22 your signature and review?  
23 A. Yes. As the deputy assistant  
24 secretary, she reviewed many of the determinations  
25 that I made and prepared them for my signature.

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1 Q. But this is the only affidavit that she  
2 prepared; is that correct?  
3 A. That's correct.  
4 Q. And you didn't question it at all?  
5 A. I didn't sign it.  
6 Q. I didn't ask you that. You didn't  
7 question it at all? You didn't ask her any  
8 questions concerning the origin, why she created  
9 this affidavit?  
10 A. No, I did not.  
11 Q. You didn't ask her any questions about  
12 the content of the affidavit?  
13 A. I don't recall that I did.  
14 Q. Didn't you find it somewhat unusual  
15 that she would create an affidavit for your  
16 signature when she was not General Counsel and she  
17 was not so instructed to do so by you?  
18 A. I assumed that she was acting in what  
19 she thought was my best interests.  
20 Q. Even though this is the first time she  
21 had ever done so?  
22 A. Well, she always acted in my best  
23 interests.  
24 Q. No. In terms of creating an affidavit  
25 for your signature.

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1 A. This is the first time she ever created  
2 an affidavit.  
3 Q. And you did not discuss the contents  
4 with her?  
5 A. No.  
6 Q. Did you discuss the contents of this  
7 affidavit with anybody?  
8 MR. RAUH: Same objection.  
9 MR. BALARAN: No problem.  
10 BY MR. BALARAN:  
11 Q. Just, did you discuss the contents?  
12 A. I can only assume that this  
13 information -- well, I did -- I can only assume  
14 that the bulk of the content of this came from my  
15 discussion with Sabrina McCarthy.  
16 Q. And that wasn't my question. I asked  
17 you, did you discuss the contents of this  
18 affidavit with anybody.  
19 A. Yes.  
20 Q. With whom?  
21 A. My counsel.  
22 Q. Private or professional? I should say,  
23 we are all professionals, excuse me. Your  
24 personal counsel or --  
25 A. My personal counsel.

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1 Q. Did you discuss this with the Office of  
2 the Solicitor?  
3 A. No.  
4 Q. Did you discuss it with the Department  
5 of Justice?  
6 A. No.  
7 Q. Was it your decision not to sign this  
8 document?  
9 A. Yes.  
10 Q. Are the contents of this document  
11 accurate? Are the statements made in this  
12 affidavit accurate?  
13 A. Most are. There are some that aren't.  
14 Q. Tell me which ones are not.  
15 A. 13.  
16 Q. I have never deleted e-mail that is  
17 located in the sent box of my e-mail account.  
18 A. That's not accurate.  
19 Q. What would be the truth?  
20 A. I started backing up from current times  
21 in the first of October in response to the message  
22 that I got that the threshold memory had been  
23 exceeded.  
24 Q. October of what year?  
25 A. 2002. It was on the same day as

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1 October 10th, that I began to systematically  
2 delete some of these sent e-mails in order to gain  
3 capacity, and I went through -- there was only a  
4 few days in October, I went through September, and  
5 that's when I asked Mrs. Maybee, before I  
6 eradicated all these sent e-mails, I asked her  
7 about the backup at that point. When she said  
8 that she had not, I stopped at that point.  
9 Q. Okay. Let's go back to this number 13,  
10 however. So you did in fact delete e-mails  
11 located in the sent box, correct?  
12 A. For that period of time, September and  
13 the first ten days of October.  
14 Q. So the statement that first came to me  
15 that the deletions of incoming e-mails had --  
16 strike that. Going back to the first, to the  
17 exhibit of October 16th --  
18 MS. CAMPBELL: Mr. Balaran, are you  
19 relating to Cobell related e-mails or all e-mails?  
20 MR. BALARAN: I will get to that in a  
21 moment. The October 16th, 2002 letter that first  
22 advised me says, please advise the special  
23 master --  
24 MR. RAUH: Excuse me. October 16th was  
25 not addressed to you.

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1 MR. BALARAN: I'm sorry, I apologize,  
2 that was addressed to the Department of Justice.  
3 It says, please advise the special master that it  
4 appears that e-mail messages received by the  
5 Assistant Secretary-Indian Affairs, from  
6 approximately December 1st, 2001 to approximately  
7 October 1st, 2002, may have been deleted before  
8 they were printed and filed.  
9 BY MR. BALARAN:  
10 Q. Now, am I to understand now from your  
11 testimony that it's not just incoming e-mails that  
12 were deleted, but also outgoing e-mails that were  
13 deleted?  
14 A. The vast majority of the outgoing  
15 e-mails, the sent e-mails are still there, and  
16 they're printed. The only ones that were deleted  
17 are the ones from October 10th back through the  
18 month of September, or maybe a couple days of  
19 August, and that's when I raised the question and  
20 that's when I stopped deleting them.  
21 Q. So my question to you is that this  
22 statement -- strike that. Okay.  
23 You stated at one point that you got a  
24 message of some sort informing you that your box  
25 was full or something like that?

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1 A. Yes.  
2 Q. What was the message that you received?  
3 A. I don't recall it precisely but  
4 essentially the content of the message was, you're  
5 running out of memory capacity in your e-mails,  
6 you need to delete some of your e-mails.  
7 Q. Did you call anybody to discuss this?  
8 A. No, I did not.  
9 Q. You didn't discuss it with Miss Maybee?  
10 A. No, I did not.  
11 Q. With the e-mail administrator?  
12 A. No, I did not.  
13 Q. With Clarence?  
14 A. No, I did not.  
15 Q. Was there a reason that you chose not  
16 to discuss what the ramifications of having an  
17 e-mail message like this was?  
18 A. Well, the ramifications were that I  
19 needed to reduce the number of e-mails that I had  
20 stored, and I thought that they were being  
21 electronically saved.  
22 Q. And I understand that's your position  
23 and we will explore that in a moment, but when you  
24 deleted your e-mails, did you delete them from  
25 your in box?

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1 A. Primarily.  
2 Q. Where else did you delete them?  
3 A. Well, I deleted the sent e-mails for  
4 that month and odd days that I just answered to.  
5 Q. Any other boxes that you deleted  
6 e-mails from?  
7 A. No, I don't know that I have any boxes  
8 besides inbound and sent.  
9 Q. Well, do you have a drafts box?  
10 A. Yes, I do.  
11 Q. Did you delete e-mails from your drafts  
12 box?  
13 A. No.  
14 Q. Do you have a trash box?  
15 A. Yes.  
16 Q. Did you delete e-mails from your trash  
17 box?  
18 A. Yes, I thought that was part of the  
19 cleaning process. I transferred them to the trash  
20 box and I didn't delete them, but there was a  
21 little circle figure there and I would hit that  
22 because if I didn't, they stayed there.  
23 Q. Why did you do that, why did you delete  
24 them from the trash box?  
25 A. Because I was through with them and I

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1 thought they were being saved.  
2 Q. Even though you hadn't printed them?  
3 A. Yes, sir.  
4 Q. Are you aware of the fact that once  
5 you, if you had not deleted from your trash box,  
6 they would still be on your computer?  
7 A. I am now. I wasn't then.  
8 Q. Why didn't you go seek some  
9 information?  
10 A. I should have.  
11 Q. Any of the information that you deleted  
12 from your sent box, were any of those  
13 communications Cobell related communications?  
14 A. To the best of my knowledge, they were  
15 not. I can't tell you absolutely that there  
16 weren't some. I was systematically going through  
17 them and I don't remember seeing any e-mails that  
18 related to the three specified areas of the Cobell  
19 litigation.  
20 Q. Is it your practice to read the  
21 practices and directives that come to you from the  
22 Office of the Solicitor, the Assistant  
23 Secretary-Policy, Management and Budget?  
24 A. Yes, sir, it is. I get copious notes  
25 and copious policies from all those different

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1 operatives, and I can't tell you that I remember  
2 them all. I will tell you that I remember this  
3 one.  
4 Q. Are you aware that there came a point  
5 in time that the special master drafted an opinion  
6 related to the destruction of e-mails in this  
7 litigation?  
8 A. I don't have a specific knowledge of  
9 that.  
10 Q. Do you have even a vague knowledge of  
11 that?  
12 A. I had a knowledge that we were supposed  
13 to save them, that was clear.  
14 Q. Do you believe that, we were talking  
15 before about what the definition of Indian Trust  
16 records are. Do you believe that there were any  
17 communications that you deleted that were Indian  
18 Trust records?  
19 A. No.  
20 Q. Even though they related to --  
21 A. Well, let me readdress that issue. The  
22 IIM account daily reports clearly had information  
23 about Indian Trust records. I deleted those, we  
24 recovered them.  
25 Q. But you testified that you deleted

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1 other Cobell related material, is that not  
2 correct?  
3 MR. RAUH: Objection, it's not correct.  
4 MR. BALARAN: That's fine.  
5 BY MR. BALARAN:  
6 Q. Testify now. Have you deleted anything  
7 besides the OIRM monthly reports that would be  
8 part of the three functional areas?  
9 A. Not to my knowledge.  
10 Q. Okay.  
11 (McCaleb Exhibit 7 marked for  
12 identification.)  
13 BY MR. BALARAN:  
14 Q. I'm handing you a series of documents  
15 that were given to me in response to my request  
16 for Interior's policies on retaining, printing and  
17 filing Cobell related e-mail messages, and they  
18 are Bates stamped SMREQ0024950 and it goes through  
19 SMREQ0024997.  
20 A. I'm not -- whereabouts is that?  
21 Q. It's on the bottom right-hand.  
22 A. Oh, okay.  
23 Q. You see 24950?  
24 A. Yes.  
25 Q. And the last page is 24997?

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1 A. Yes.  
2 MR. RAUH: Mr. Balaran, just so I  
3 understand, you're saying these documents were  
4 given to you in separate documents that are now  
5 combined into a single exhibit.  
6 MR. BALARAN: That is correct. My  
7 request was for all the policies -- let me just  
8 explain it for the record. I requested all the  
9 policies regarding e-mail, Cobell related e-mail  
10 saving, retention, printing and filing, and this  
11 is what was given to me.  
12 BY MR. BALARAN:  
13 Q. Did you review these documents before  
14 they were transmitted to me in response to my  
15 request?  
16 A. No.  
17 Q. Okay. I want to turn your attention,  
18 if I may, to the document with the Bates stamp  
19 SMREQ0024959.  
20 A. I think I have that document.  
21 Q. And that's a document on the letterhead  
22 of the United States Department of the Interior  
23 Office of the Secretary, dated August 3rd, 2001,  
24 and it's a memorandum from Daryl White, the Chief  
25 Information Officer, to Acting Associate Solicitor

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1 and others. Do you see this document?  
2 A. Yes.  
3 Q. And I believe the document is three  
4 pages long. Can you take a look at that?  
5 A. (Perusing.) All right.  
6 Q. On the second page there is a cc. list.  
7 Would you take a look at that, and would you  
8 notice that second from the bottom is the  
9 Assistant Secretary for Indian Affairs?  
10 A. Yes.  
11 Q. And since the date is August 3rd, 2001,  
12 at that point in time you were the Assistant  
13 Secretary for Indian Affairs, correct?  
14 A. I had been for 29 days.  
15 Q. Does that have -- well, you're saying  
16 that for what relevance, what purpose?  
17 A. That's just a fact.  
18 Q. Okay. So you were now the Assistant  
19 Secretary for Indian Affairs for 29 days. Does  
20 that in any way vitiate or minimize your  
21 responsibility to read directives as they come  
22 out?  
23 A. No, it does not. I want to imply that  
24 there were mountains of policies and information  
25 that I had not reviewed and that I was becoming

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1 acquainted with in a very short period of time.  
2 Q. Can you think of anything among your  
3 trust responsibilities that are more important  
4 than retaining documents relating to the Trust?  
5 And when I'm talking about the Trust I'm not  
6 talking law enforcement, I'm not talking  
7 education, I'm talking about fiduciary  
8 responsibilities of the United States Government  
9 vis-a-vis the IIM beneficiaries.  
10 MR. RAUH: Objection.  
11 MR. BALARAN: Fine, noted. Please  
12 answer.  
13 THE WITNESS: Yes, I can think of some.  
14 BY MR. BALARAN:  
15 Q. Please tell me.  
16 A. The maintenance of the honesty and  
17 integrity of the system and the people who operate  
18 the system.  
19 Q. Give me an example of the maintenance  
20 and integrity of the system.  
21 A. Well, if I determine that there is  
22 somebody that is misappropriating IIM account  
23 funds, I think that's more important than the  
24 record, because that's what we're trying to  
25 protect with the record is the funds.

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1 Q. I see, okay. Do you recall reading  
2 this --

3 A. No, I don't.

4 Q. Let me just finish. Do you recall  
5 reading this memorandum that is dated August 3rd,  
6 2001?

7 A. No, I don't.

8 Q. Okay. I would like to turn your  
9 attention back again to the Declaration of  
10 Assistant Secretary Neal McCaleb that is  
11 Exhibit 5. Okay?

12 MR. RAUH: I'm just trying to  
13 concentrate on this last exhibit you've shown him.  
14 If I understand it correctly, it is a memorandum  
15 to a series of chief information officers with  
16 copies to a series of people shown on page 60, and  
17 then an attachment to that. Is that correct?

18 MR. BALARAN: That's correct.

19 MR. RAUH: That's the three pages?

20 MR. BALARAN: That's correct.

21 MR. RAUH: So in this case Mr. McCaleb  
22 was a copy?

23 MR. BALARAN: I don't believe I implied  
24 anything other, and again, I acknowledged that you  
25 were in office for 29 days at the time.

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1 BY MR. BALARAN:

2 Q. Going back to your declaration, I would  
3 like to go through this with you if I may.

4 A. That's fine.

5 Q. And just so I'm absolutely clear, did  
6 you review this with the Office of the Solicitor  
7 before this was tendered?

8 A. No, I did not.

9 Q. Did they know that you were preparing a  
10 declaration?

11 A. No, or at least I didn't tell them that  
12 I was.

13 Q. After this declaration was submitted to  
14 me, did anybody from the Office of the Solicitor,  
15 Department of Justice contact you concerning this  
16 declaration?

17 A. No.

18 Q. It says, I Neal A. McCaleb, this 19th  
19 day of November, 2002, hereby declare under  
20 penalty of perjury as follows: I am the Assistant  
21 Secretary of the Department of the Interior for  
22 Indian Affairs. I did not knowingly or  
23 intentionally destroy any e-mails. Did you delete  
24 the e-mails?

25 A. Yes.

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1 Q. Did you do so intentionally?

2 A. Yes.

3 Q. Did you do so knowingly?

4 A. Yes.

5 Q. So when you said that you did not  
6 destroy them, was that based on the assumption  
7 that somebody else was saving them?

8 A. That's right, and that they were  
9 recoverable. Destroy implies that they're gone.

10 Q. What's the Department policy for  
11 recovering and capturing e-mails, do you know?

12 A. I don't have any specific knowledge of  
13 that.

14 Q. Well, tell me what it is generally.

15 A. I was under the impression, I was told  
16 that we were making backup tapes of all the  
17 e-mails. I was also told by my assistant that she  
18 was making files.

19 Q. Let's go through the policy of backups.  
20 I have to focus your attention on the question  
21 asked. What is the policy, can you state it in  
22 either form or in substance, what is the  
23 Department of the Interior's policy concerning the  
24 capture and backup of e-mails?

25 A. That backup tapes are made for all

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1 e-mails.

2 Q. And how often does this happen?

3 A. I have become aware recently that they  
4 are backed up weekly.

5 Q. Were you aware of that at the time that  
6 you were deleting these e-mails?

7 A. Not specifically that they were backed  
8 up weekly.

9 Q. Then how could you assume -- you  
10 testified earlier that you assumed that they were  
11 backed up.

12 A. Because I would leave them on there for  
13 a couple of weeks.

14 Q. But again, if you didn't know what the  
15 policy for the backing up was, how can you  
16 possibly make such an assumption?

17 A. I did make that assumption.

18 Q. Was it based on something you read?

19 A. I don't know.

20 Q. Let's go into what you believe Miss  
21 Maybee was to do. What was your understanding of  
22 what Miss Maybee was to do vis-a-vis your e-mails?

23 A. That she was making files and taking  
24 the e-mails that related to Cobell and putting  
25 those into a file folder and saving them, and in



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1 fact she was.

2 Q. Okay. And to your knowledge, was she  
3 filing and saving e-mails that you had deleted?

4 A. She was filing and saving them before  
5 they were deleted.

6 Q. So an e-mail would come in, she would  
7 file and save it and then you would delete it,  
8 correct?

9 A. An e-mail would come in, I left them  
10 all on there for a couple of weeks to give her  
11 adequate time to file them in separate folders.

12 Q. And then you would delete them?

13 A. Ultimately I began to delete them after  
14 I got the message that the capacity of the memory  
15 was being reached.

16 Q. Did you instruct Miss Maybee to file  
17 and save your e-mails?

18 A. No, I did not.

19 Q. Did you instruct her to archive your  
20 e-mails?

21 A. No, I did not.

22 Q. Did you instruct her to preserve your  
23 e-mails?

24 A. No, I did not.

25 Q. Well, you stated earlier that your

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1 Let's do it this way. Did she say it when you  
2 first came on in July?

3 A. No, I would say that I became aware  
4 that she was doing that in the fall.

5 Q. Fall of what year?

6 A. Fall of 2001.

7 Q. And what circumstance in the fall of  
8 2001 came about that you would have had this  
9 discussion?

10 A. Because we were disconnected from the  
11 Internet and before I had taken my computer laptop  
12 with me so I could pick up the e-mails, and now I  
13 couldn't do that anymore. And she in the  
14 conversation advised that she was filing those  
15 e-mails.

16 Q. Now, explain to me why explaining that  
17 she was filing would be commensurate with  
18 explaining that she was saving. Isn't it true,  
19 sir, that she simply said that she was going to  
20 create files for you, different folders that you  
21 could put your e-mails in?

22 MR. RAUH: Objection. Is there a basis  
23 for that question?

24 MR. BALARAN: Well I'm just asking.

25 BY MR. BALARAN:

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1 instructions in another context were on Post-Its,  
2 et cetera, that you gave instructions, but here  
3 something in preserving documents, at least the  
4 OIRM morning reports, you gave no such written  
5 instructions?

6 A. Because I was advised that she was.

7 Q. Who advised you?

8 A. She did.

9 Q. Tell me the conversation in which she  
10 advised you of that.

11 A. I don't have a specific recollection of  
12 the conversation when she advised me of that.

13 Q. At what point in time did she --

14 A. Nor did I have a recollection of how  
15 her filing systems operated, but I assume that  
16 she's filing all the documents that I send to her  
17 to file.

18 Q. But you're testifying based on an  
19 assumption and you're stating that you assumed  
20 that she was performing an act, and I'm simply  
21 asking you, what's the basis for your assumption?

22 A. Because she said that she was.

23 Q. And when did she say this?

24 A. And I can't give you a specific date.

25 Q. And I'm not asking for a specific date.

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1 Q. Did she tell you that?

2 A. I don't recall that. My recollection  
3 is that there was a method of saving the e-mail.

4 Q. Did there come a point in time that  
5 Miss Maybee created folders for your e-mails?

6 A. That's what my understanding was.

7 Q. And where did you come by that  
8 understanding?

9 A. From her.

10 Q. And was this during the same  
11 conversation?

12 A. I think. I don't have a specific  
13 recollection.

14 Q. And I appreciate that. Is this what  
15 you meant by Miss Maybee is filing your e-mails?

16 A. Yes.

17 Q. Do you have any distinct recollection  
18 of Miss Maybee saying, I will save your e-mails?

19 A. No, but in fact she was.

20 Q. How do you know that?

21 A. She said that that was her -- when we  
22 began to discuss -- I was gone for long absences,  
23 over half my time has been away from the office in  
24 conducting the consultations and task force  
25 hearings with the Indian tribal task force in

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1 Indian country. So, I would have two weeks of  
2 e-mails or a week of e-mails in accumulation, and  
3 she was I think explaining to me how we were going  
4 to manage that.

5 Q. And this was in the same time frame,  
6 correct, this roughly Thanksgiving --

7 A. I started that travel schedule in  
8 November.

9 Q. The Thanksgiving period of 2001  
10 roughly?

11 A. Right.

12 Q. Did she state to you she was going to  
13 archive your e-mails?

14 A. I can't say that she said that specific  
15 word, no.

16 Q. Okay. Number 3. Shortly after I --  
17 I'm reading from your declaration, the third  
18 paragraph -- shortly after I was sworn in to  
19 office on July 4th, 2001, it was my impression  
20 that my administrative assistant was saving my  
21 e-mail messages relating to American Indian trust  
22 reform, including the high level implementation  
23 plan, any of its subprojects, the Cobell v. Norton  
24 litigation, and administration of Individual  
25 Indian Money accounts hereinafter Cobell-related

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1 e-mails?

2 A. Yes.

3 Q. How many such conversations did you  
4 have?

5 A. I don't know specifically. She was  
6 very concerned about the preservation of e-mails  
7 and she made a point, talked about her -- before  
8 she left in June of 2002 -- about the extensive  
9 files that she had built up as deputy  
10 commissioner.

11 Q. And how many such conversations do you  
12 recall, was it more than one?

13 A. I think it was probably more than one.

14 Q. Was would you say it was more than  
15 five?

16 A. I don't know that it was more than  
17 five.

18 Q. Can you tell me what the general tenor  
19 or substance of these conversations was?

20 A. Well, she was talking, she had a lot of  
21 boxes around her office and she wanted to come  
22 back in the office after she had resigned, and she  
23 needed to have the keys so that she could sort  
24 through her e-mails and her files.

25 Q. And what was the conversation itself?

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1 e-mails. Did your discussion with Miss Maybee  
2 during this November 2001 time frame discuss  
3 specifically messages relating to the American  
4 Indian trust reform?

5 A. Yes, I think they did, but I don't  
6 really recall. I think she was trying to save not  
7 only Cobell-related e-mails, but e-mails she  
8 thought that I had not dealt with.

9 Q. How did you expect Miss Maybee, who was  
10 a GS-12 staff assistant, to know what a  
11 trust-related e-mail was?

12 A. Well, she was my administrative  
13 assistant and I expected that.

14 Q. And did you expect that because of some  
15 instruction or direction you gave her on how to  
16 tell what a Cobell-related e-mail was versus  
17 another one?

18 A. That was my expectation.

19 Q. I understand, but did you give her any  
20 direction that would assist her in that regard?

21 A. No.

22 Q. Did there come a point in time that you  
23 have a conversation with Miss Sharon Blackwell,  
24 the former Assistant Deputy Commissioner,  
25 concerning the preservation and retention of

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1 A. Well, I told you the substance that I  
2 can remember.

3 Q. Well, if you could repeat it, I'm  
4 sorry?

5 A. That in fact she had felt the need, she  
6 had accumulated extensive files of e-mails that  
7 she needed to catalog, and that space needed to be  
8 set aside in the office to retain these.

9 Q. Did she convey to you at any point in  
10 time the importance of retaining and preserving  
11 e-mails?

12 A. Well, just from the standpoint that she  
13 was.

14 Q. But did she impress upon you, did she  
15 say specifically in form or some substance that  
16 it's important to retain Cobell-related e-mails?

17 A. That was implied in the conversation.  
18 I don't know that she directed it just like that,  
19 but that's why --

20 Q. That's why I said in form or in  
21 substance, something to that effect?

22 A. Uh-huh.

23 Q. Did she convey that?

24 A. Yes.

25 Q. Are you aware that Miss Blackwell had a

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1 habit of burning her e-mails on a CD?  
2 A. No.  
3 Q. Do you have any knowledge that Miss  
4 Blackwell at times would come in on weekends with  
5 her staff in order to categorize and make folders  
6 for her e-mails?  
7 A. She did not share that with me.  
8 Q. Well, did anybody else share that with  
9 you?  
10 A. No.  
11 Q. Was it Miss Maybee's job to save your  
12 e-mails?  
13 A. I thought it was, yeah, just as I  
14 thought it was her job to handle the filing. She  
15 was my administrative assistant.  
16 Q. Even though, you realize her title was  
17 staff assistant?  
18 A. I didn't know what her title was, I  
19 think I said that earlier.  
20 Q. Okay.  
21 A. I have always used the title  
22 administrative assistant.  
23 Q. Is there a reason you didn't use her  
24 name specifically in the declaration?  
25 MR. RAUH: Objection.

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1 MR. BALARAN: That's all right, just  
2 you personally. Do you have a reason to not  
3 answer that? Strike that. That's quite all  
4 right. I don't need an answer to that.  
5 BY MR. BALARAN:  
6 Q. Do you know of any other administrative  
7 assistants or staff assistants in the office that  
8 saved the e-mails of their bosses, supervisors,  
9 et cetera?  
10 A. At the Department of Interior, I have  
11 no specific knowledge.  
12 Q. Do you know whether it's policy,  
13 written or unwritten, for staff assistants or  
14 administrative assistants to do so?  
15 A. I have no knowledge of that.  
16 Q. How do you distinguish between an  
17 e-mail that falls within one of the three  
18 functional areas or one that does not?  
19 A. If it says Cobell on it, I assume it's  
20 Cobell related. If it speaks of the litigation,  
21 it will always say Cobell on it. If it's IIM  
22 account related such as the daily reports, that's  
23 self evident on its face. If it has to do with  
24 the TMIP, it will say TMIP on it.  
25 Q. And so you had a certain number of

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1 categories that you would know just by the heading  
2 constituted the three functional areas, correct?  
3 A. That's right.  
4 Q. How about if I sent something that said  
5 LLRIS?  
6 A. I wouldn't presume that that was on its  
7 face a Cobell-related document.  
8 Q. How about just the three -- I was  
9 asking not Cobell as much as the three functional  
10 areas. Is that the same answer?  
11 A. Yes.  
12 Q. How about if I have something that says  
13 IRMS, would you assume that an e-mail with the  
14 heading IRMS would fall within the category of  
15 under the three functional areas?  
16 A. Not necessarily.  
17 Q. Okay.  
18 MS. KESSLER: The question was on its  
19 face.  
20 MR. BALARAN: Well, all you see is the  
21 subject heading.  
22 MS. KESSLER: There could be more in  
23 the e-mail.  
24 MR. BALARAN: Well, then let's go  
25 through it.

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1 BY MR. BALARAN:  
2 Q. When somebody like Jean Maybee sees  
3 your screen, would she see just the subject  
4 heading of the e-mail, or would she see the whole  
5 e-mail?  
6 A. Well, she could open the e-mail.  
7 Q. So could open it, I understand, but  
8 would it normally just have the heading?  
9 A. Normally it just says who the letter  
10 came from and sometimes it will have a subject,  
11 but most of the time, or many times it doesn't  
12 have a subject, you have to open the e-mails.  
13 Q. Did you instruct Miss Maybee to open  
14 your e-mails?  
15 A. I gave her full access to them.  
16 Q. That wasn't what I asked. Did you  
17 instruct her to do so?  
18 A. Not specifically.  
19 Q. Well, she certainly couldn't open the  
20 ones that were encrypted?  
21 A. That's correct.  
22 Q. Anything besides the OIRM morning  
23 reports that were encrypted?  
24 A. Not to my knowledge. I didn't have any  
25 knowledge that they were encrypted.

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1 Q. I understand. So if Miss Maybee would  
2 open up an e-mail just to satisfy the question, if  
3 Miss Maybee would open up an e-mail and see on the  
4 heading that it said LLRIS or IRMS, is it your  
5 testimony that it may or may not be something that  
6 falls within the three functional areas?

7 A. That's correct.

8 Q. Okay.

9 Number 4. Even though I thought my  
10 Cobell-related e-mails were being electronically  
11 saved, it was initially my practice to leave all  
12 Cobell-related e-mails on my computer  
13 indefinitely. In the late spring or early summer  
14 of 2002 I began receiving automatic messages on my  
15 computer stating that I had exceeded the maximum  
16 memory threshold allowable, and that I might not  
17 be able to send or receive e-mails if I did not  
18 delete e-mails. That was the first time you had  
19 received such a message?

20 A. Yes.

21 Q. How many such messages did you receive?

22 A. They began to pop up with some  
23 frequency. It didn't say I had exceeded it, it  
24 said I was approaching the threshold of my memory  
25 allocation.

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1 Q. Okay. As a result of these messages, I  
2 began immediately deleting all e-mail messages  
3 that were not Cobell related.

4 A. That's correct.

5 Q. I want to turn your attention again if  
6 I may to Exhibit 7, which were the policies on  
7 retaining, printing and filing Cobell related  
8 e-mail messages. I'm sorry, it's the big thick  
9 one. I'm not referring to anything specific, I'm  
10 just going to the bottom of the documents  
11 themselves. I want to refer you to this document  
12 again, and this was appended to the November 8th,  
13 2002 letter from Miss McCarthy to Mr. Miller at  
14 the Department of Justice that was in response to  
15 my requests.

16 And let's take a moment if we can, if  
17 you turn the page, it says Interior's policies in  
18 retaining, printing and filing Cobell-related  
19 e-mail messages. The first such memo, which is  
20 Bates stamped on the bottom right-hand corner  
21 SMREQ0024952, do you see that?

22 A. Yes.

23 Q. Is a memorandum from William G. Myers  
24 III, the Solicitor, and P. Lynn Scarlett, the  
25 Assistant Secretary for Policy, Management and

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1 Budget, to the Office of the Secretary, and you're  
2 the second in the line, the Assistant  
3 Secretary-Indian Affairs, correct?

4 A. Yes.

5 Q. So you're not just copied on this, this  
6 is directed to you second in line, correct?

7 A. That's correct.

8 Q. And this is November 28, 2001, correct?

9 A. Yes, sir.

10 Q. At this point you have been in office  
11 for several months?

12 A. Four.

13 Q. Well, if you came in July 4th, I would  
14 argue that it's even more than four months.

15 A. Well, five, not five complete months,  
16 but nearly five.

17 Q. And the subject matter of this,  
18 document retention related to trust management and  
19 Individual Indian Money accounts. Why don't you  
20 look through this memo and its attachments, which  
21 are only two pages, I believe, and tell me if I  
22 you recall ever seeing this document.

23 A. I don't recall having seen the document  
24 itself. I was aware generally of its content.

25 Q. Then let's turn to the second page of

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1 that, if we may. The top of the page says  
2 reminder instructions to employees about retention  
3 of e-mail messages. Under printing and filing, do  
4 you see that?

5 A. Yes.

6 Q. It says, you must print to paper and  
7 file all e-mail messages that you send or receive  
8 that relate to the three functional areas. Do you  
9 see that?

10 A. Yes.

11 Q. Were you generally aware of that  
12 policy?

13 A. I really didn't think that we had to  
14 print them.

15 Q. As you look at them now --

16 A. And the reason I say that, this arrived  
17 while I was out of town, I'm specifically aware of  
18 that, because on November 28th I was at the  
19 National Congress for American Indians meeting in  
20 Spokane, Washington. I had injured my leg, I had  
21 to leave the convention, I went home to be treated  
22 by my doctor. I was gone for most of the  
23 following week and when I came back, I had been  
24 gone for almost two weeks, and there obviously was  
25 a large accumulation of mail, and I will admit to

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1 you that I didn't read every piece of mail that  
2 was there.

3 Q. Well, if I could turn your attention to  
4 the letter dated November 8th, 2002, would you  
5 take a look at that please, Number 4. Take a look  
6 on page 3, if you would. And I will direct you to  
7 footnote 3; do you see that?

8 A. Yes.

9 Q. And it says, Mr. McCaleb's travel  
10 records show he was out of the office from  
11 November 12, 2001, and then it goes up until  
12 September 23, 2002. Is that correct?

13 A. December.

14 Q. September 23, 2002, at the end, I'm  
15 going through the whole length of time. There's  
16 various increments therein.

17 A. The first area substantiates what I  
18 said, that I was out of the office from November  
19 12th, 2001 until December 2nd, 2001.

20 Q. Okay. Now, did you supply your  
21 calendar to Miss McCarthy or anyone else that  
22 would have assisted them in writing this footnote?

23 A. Well, I didn't personally supply it.

24 Q. Do you know who did?

25 A. I don't have specific knowledge.

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1 Q. Did you review this before it went out  
2 to verify its accuracy?

3 A. I glanced at it, the dates looked  
4 reasonable to me, just like I identified that one  
5 there, and my calendar as we've indicated before  
6 was immediately available to Mrs. Maybee, since  
7 she kept the calendar, she managed the calendar.

8 Q. Do you believe that simply being out of  
9 the office on travel somehow diminishes the  
10 responsibility --

11 A. No, sir, I --

12 Q. You have to let me finish the question.  
13 Do you believe that being out of the office on  
14 travel diminishes your responsibility to read the  
15 memoranda that are directly addressed to you?

16 MR. RAUH: Objection. It's  
17 argumentative and may call for a legal conclusion.

18 BY MR. BALARAN:

19 Q. You can answer to the best of your  
20 ability, please.

21 A. I don't think it relieved me from the  
22 responsibility of knowing what was in them, but  
23 there was a real limitation in terms of time of  
24 what I could do and what I couldn't do. I  
25 admitted that I knew about what the content was

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1 but I didn't know about the specific memo.

2 Q. Well, let's talk about the content  
3 then. Assuming that you didn't read this memo  
4 because you were out of town as you state, it says  
5 you must print to paper and file all e-mail  
6 messages that you send or receive if they relate  
7 to the three functional areas. Were you aware of  
8 that, whether it came from this directive or  
9 others?

10 A. I was aware that I needed to save the  
11 memos.

12 Q. So you were not aware of the  
13 requirement to print to paper and file all e-mail  
14 messages that you sent or received?

15 A. No.

16 Q. Okay. Then I will ask you to go down  
17 to the first bullet, and we're back to that same  
18 page which is SMREQ0024953, and it says above the  
19 bullet, you must keep in mind a few additional  
20 points about preserving e-mail messages. Both  
21 senders and recipients of an e-mail message are  
22 equally obligated to print and file it. Were you  
23 aware that senders also had an obligation to print  
24 and file e-mail messages?

25 A. I was aware that senders had an

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1 obligation to save their e-mail messages.

2 Q. My question again is a little bit  
3 different. Are you aware that senders had an  
4 equal obligation to print e-mail messages?

5 A. I'm going to try to respond to this the  
6 best way that I can and accurately tell you what I  
7 believe.

8 Q. What period of time are we talking  
9 about?

10 A. Up until October 10th of 2002.

11 Q. Okay.

12 A. That we had to have the ability to  
13 print from a recorded source. I didn't think  
14 there was a responsibility to print each e-mail  
15 each day.

16 Q. And what are you basing your assumption  
17 on?

18 A. The limitations at the time on the  
19 assistant secretary.

20 Q. Did somebody tell you that due to the  
21 fact that there were limitations of your time as  
22 assistant secretary, you were relieved of the  
23 obligation of -- and I understand this is, I'm not  
24 asking for a legal conclusion, just based on your  
25 understanding as assistant secretary.

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1 MR. RAUH: Plus argumentative.  
2 MR. BALARAN: Okay.  
3 BY MR. BALARAN:  
4 Q. Did somebody at any point in time  
5 inform you that based on your schedule, your busy  
6 schedule as an assistant secretary, you were  
7 relieved of the responsibility of printing sent  
8 e-mail messages?  
9 A. Nobody ever specifically advised me of  
10 that.  
11 Q. Did they advise you generally?  
12 A. I have no recollection.  
13 Q. Did you ever see anything in writing to  
14 that effect?  
15 A. I have no memory of having ever seen  
16 anything in writing.  
17 Q. Okay. How many assistant secretaries  
18 are there for the Department of the Interior?  
19 A. There are five.  
20 Q. Do you have meetings with the assistant  
21 secretaries?  
22 A. Yes.  
23 Q. I mean, are there like assistant  
24 secretary conventions?  
25 A. There's a weekly meeting of the

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1 assistant secretaries with the Secretary of the  
2 Interior and her key staff.  
3 Q. Did the topic of retention, filing and  
4 preservation of e-mails ever come up during any of  
5 these meetings that you have referred to?  
6 A. I have no specific recollection that  
7 they did. There was a meeting that I was absent  
8 from subsequent to the revelation of this event on  
9 October 10th, that that was specifically brought  
10 up.  
11 Q. How do you know it was brought up?  
12 A. Because I got copies of information  
13 from the meeting.  
14 Q. And what was the information from the  
15 meeting?  
16 A. It went into great detail on the need  
17 to print and save Cobell-related e-mail.  
18 Q. In keeping with the memorandum that I  
19 have just shown you?  
20 A. Yes.  
21 Q. Okay. Let's go to the next page, if we  
22 may, SMREQ0024054. Under the topic, insuring  
23 captured e-mail messages on backup media, it says,  
24 e-mail messages related to the three functional  
25 areas can be deleted from user mailboxes only

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1 after they are captured by the systems  
2 administrator on an e-mail backup that is  
3 designated for indefinite retention. This means  
4 that even after you have printed and filed e-mail  
5 messages related to the three functional areas,  
6 you must not delete them until they are backed up.  
7 To insure your compliance with this  
8 policy, please follow this procedure: Be sure  
9 that your computer is set to save your outgoing  
10 messages in your sent box. If you are not sure  
11 whether your computer is set to save your sent  
12 messages, please consult your e-mail  
13 administrator.  
14 Were you aware or did there come a  
15 point in time that you became aware of the  
16 requirement to set your computer to save your  
17 outgoing messages to your sent box?  
18 A. Well, it was saving them.  
19 Q. Oh, it was?  
20 A. Yes.  
21 Q. So this was something that you just did  
22 without having to get the specific instruction?  
23 A. That's right, it was saving.  
24 Q. But was it saved by default or was it  
25 saved because you purposely were following the

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1 instruction, something like this that you  
2 understood?  
3 A. I wanted to save them because I would  
4 use them for reference, a lot of my sent e-mails  
5 are instructions to subordinates and I would use  
6 them to follow up on.  
7 Q. After printing, leave your e-mail  
8 messages on the computer without deleting them  
9 until they are captured by a backup. Did you do  
10 so?  
11 A. I thought I was doing so, yes, sir.  
12 Q. Did you ever get verification that in  
13 fact your e-mails were captured by a backup?  
14 A. No.  
15 Q. How did you think you were doing so?  
16 A. Because we were told that e-mails were  
17 all being backed up.  
18 Q. Who told you?  
19 A. I don't have the specific recollection  
20 of that.  
21 Q. Do you have a general recollection or a  
22 vague recollection?  
23 A. I think that information came from  
24 Mr. Kayson.  
25 Q. And at what point in time did

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1 Mr. Kayson give that instruction?  
2 A. I can't give you a date.  
3 Q. Was that after it was discovered that  
4 e-mails during that ten-month period had been  
5 deleted?  
6 A. No, it was well before that.  
7 Q. Do you recall the context in which he  
8 said that?  
9 A. In the discussion of records retention  
10 on the Cobell lawsuit.  
11 Q. And in the discussion of records  
12 retention in the Cobell lawsuit the topic of  
13 e-mails came up?  
14 A. Yes.  
15 Q. Okay. Do you recall what else was said  
16 during this meeting?  
17 A. No, I can't recall the meeting so I  
18 can't recall specifics of it, and I tried to say  
19 that, that's my impression. I can't tell you this  
20 came from Mr. Kayson.  
21 Q. All right. It says leave your e-mail  
22 messages in your in or sent box. Do not delete  
23 e-mail messages from your in or sent box until  
24 after you receive an e-mail message from your  
25 systems administrator that your e-mail messages

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1 have been backed up for indefinite retention.  
2 Were you aware that that was a requirement?  
3 A. I had never received a communication  
4 from my e-mail administrator, as evidenced by the  
5 fact that I didn't know that we had one or who it  
6 was.  
7 Q. Were you aware that there was a  
8 requirement to do so?  
9 MR. RAUH: What was required?  
10 MR. BALARAN: I'm sorry.  
11 BY MR. BALARAN:  
12 Q. This last sentence that I read, were  
13 you aware that there was a requirement not to  
14 deplete e-mail messages from your in or sent box  
15 until you received an e-mail message from the  
16 systems administrator?  
17 A. No, I was not aware that we had to  
18 receive a communication from the administrator.  
19 Q. The next page is a memorandum from  
20 Daryl White dated November 28th, 2001. Again,  
21 this is the same date and you were out of town, I  
22 believe you had stated earlier, correct?  
23 A. Yes.  
24 Q. And I believe we touched on this.  
25 Let's go two pages after this to SMREQ0024962.

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1 Have you ever seen this correspondence before?  
2 And this states that, there is a to and cc. line  
3 that are blank, this is just as it was given to  
4 me. Subject, all DOI employees reminder to save  
5 e-mail messages in hard copy. Note to  
6 supervisors, please insure that employees without  
7 access to e-mail receive a paper copy of this  
8 message. Have you seen this before?  
9 A. I don't have a recollection of having  
10 seen it before.  
11 Q. Are you aware that this also says in  
12 the second full paragraph, this is a reminder that  
13 all department personnel are required to print and  
14 properly file a paper copy of all e-mail,  
15 including transmission data in the message and  
16 attachments, whether sent or received, which  
17 discuss any of the four topics described above.  
18 Are you aware that that was the requirement,  
19 again, stated in this?  
20 A. I wasn't aware of the memo.  
21 Q. Okay. It states here, these procedures  
22 apply to all e-mail regardless of whether the  
23 substance of a particular message is contained in  
24 subsequent messages. Were you aware of that  
25 requirement, that not only did you have to save or

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1 print, but you also had to do it even if the same  
2 message was contained in another?  
3 A. No, I was not aware of that.  
4 Q. It goes on to say, please note that  
5 these procedures are broader than the normal rules  
6 that apply under the Federal Records Act and  
7 includes messages received for informational  
8 purposes only, arranging meetings and other  
9 non-records. Do you know what the Federal Records  
10 Act is, and I'm not asking for a legal  
11 interpretation, I just wonder if you know what it  
12 is?  
13 A. I'm not familiar with the Federal  
14 Records Act.  
15 Q. Do you know what a federal records is,  
16 have you ever heard that as a term of art?  
17 A. In our discussions relative to the  
18 Indian Trust records and just generalizations, I  
19 have heard it.  
20 Q. Whose discussions when you say ours?  
21 A. Special trustee, myself, Mr. Rossman,  
22 Art Gary, of the Bureau of Indian Affairs, Sharon  
23 Blackwell.  
24 Q. Are these related to the conversations  
25 you were speaking about earlier when you had the

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1 divergent views as to what constituted Indian  
2 Trust records?  
3 A. Exactly.  
4 Q. But as far as what a federal records  
5 is, you're not exactly aware?  
6 A. No.  
7 Q. How about generally?  
8 A. No, I'm not going to pretend that I  
9 have knowledge that I don't have.  
10 Q. Okay. The next page, SMREQ0024963 --  
11 well, actually I'm going to strike that.  
12 September 15th, 1999, I assume you had better  
13 things to do. So, okay, let's go back to your  
14 declaration.  
15 (Off the record discussion.)  
16 (Recess.)  
17 BY MR. BALARAN:  
18 Q. Let's go back on. Let's go to  
19 Number 5. As a result of these messages, I began  
20 immediately deleting all e-mail messages that were  
21 not Cobell related. As an extra precaution, I  
22 continued to save Cobell-related e-mails for at  
23 least a couple of weeks with the intent of  
24 allowing enough time to pass for the e-mails to be  
25 captured by the Department of the Interior's

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1 e-mail backup tapes. Is that a true statement?  
2 A. Yes.  
3 Q. Isn't it in fact also true that you  
4 also deleted Cobell-related e-mail messages?  
5 A. After they had been on the computer for  
6 a couple of weeks.  
7 Q. Do you have any independent knowledge  
8 of whether those Cobell-related e-mail messages  
9 were in fact backed up?  
10 A. I'm told that they were recoverable,  
11 yes.  
12 Q. Were all of them recoverable?  
13 A. That's what I'm told.  
14 Q. By whom?  
15 A. By Mr. Kayson and his visits with the  
16 contractors.  
17 Q. Well, do you have the knowledge to be  
18 able to explain to me how if something was deleted  
19 and is not on a backup tape you would know that it  
20 even existed in the first instance?  
21 A. No.  
22 Q. Okay. Prior to October 10, 2002, I was  
23 never informed that my e-mail messages were not  
24 being electronically preserved. Did you ask?  
25 A. Well, we discussed it in the fall of

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1 '01, yes.  
2 Q. And did you ask anybody if they were  
3 being preserved?  
4 A. No. On a periodic basis?  
5 Q. Let's say on any basis, that they were  
6 electronically preserved. That's your language.  
7 A. Well, I was told that they were being  
8 electronically preserved.  
9 Q. In those words?  
10 A. Maybe not in those precise words, but  
11 they were creating files and putting the e-mails  
12 in those files.  
13 Q. Is that what you talked about before,  
14 the creating of the folders?  
15 A. Yes.  
16 Q. On October 10, 2002, in preparation for  
17 a scheduled deposition anticipating questions  
18 regarding e-mail issues, I spoke with my  
19 administrative assistant to confirm that my e-mail  
20 messages had been saved as required. Let's  
21 discuss that for a moment. Did there come a point  
22 in time that you were noted for a deposition?  
23 A. Yes, in relationship to the Mona  
24 Enfield issue.  
25 Q. I'm going to show you a court order and

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1 notice of deposition, and we can label them 8 and  
2 9.  
3 (McCaleb Exhibits 8 and 9 marked for  
4 identification.)  
5 BY MR. BALARAN:  
6 Q. I have placed before you two exhibits.  
7 Exhibit 8, which is a one-page order filed on  
8 September 30, 2002, from Roy C. Lamberth, United  
9 States District Court for the District of Columbia  
10 that states, this matter comes before the Court on  
11 defendant's motion for protective order precluding  
12 discovery claims relating to claims of retaliation  
13 by Mona Enfield and immediate stay of depositions  
14 filed on February 12, 2001. Because an order to  
15 show cause has been issued regarding this matter,  
16 discovery is now appropriate. Accordingly, it is  
17 hereby ordered that defendant's motion shall be,  
18 and hereby, is denied. So ordered. Have you ever  
19 seen this order?  
20 A. No.  
21 Q. Were you aware that there came a point  
22 in time that the judge allowed for the discovery  
23 in the Mona Enfield matter?  
24 A. No.  
25 MR. RAUH: Wait. The word discovering



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1 is confusing him. He knew that there was a  
2 deposition of him to be taken, and I think it's  
3 the word discovery that's confusing.

4 BY MR. BALARAN:

5 Q. Do you know what discovery means?

6 A. Not in a legal sense.

7 Q. What's your understanding of discovery?

8 A. Finding something out that you didn't  
9 know about.

10 Q. You've got it right, good enough for  
11 me. Where did you go to law school?

12 There came a point in time you became  
13 aware that you were going to be deposed in the  
14 matter regarding Mona Enfield?

15 A. Yes, that's correct.

16 Q. Tell me to the best of your knowledge  
17 what the Mona Enfield matter was all about.

18 MR. RAUH: Objection. He just wants to  
19 know what you know about Mona Enfield in general.

20 THE WITNESS: Oh, I apologize.

21 BY MR. BALARAN:

22 Q. That's all right. I just wanted to ask  
23 you, you've heard of Mona Enfield, correct?

24 A. Yes, I have.

25 Q. Are you aware that Mona Enfield at one

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1 Q. Did you have any idea what you were to  
2 testify about?

3 A. Well, it was a puzzle to me, because I  
4 really didn't know anything about it other than  
5 just what I've outlined right here, and I couldn't  
6 really see how anything I had to say would be  
7 salient to that whole issue. I had no knowledge  
8 firsthand of it.

9 Q. But you knew it had something to do  
10 with OIRM, correct?

11 A. Right.

12 Q. And you knew it had something to do  
13 with retaliation of some sort?

14 A. Yes.

15 Q. And you knew that Miss Enfield was on  
16 paid leave?

17 A. Yes.

18 Q. And those are the facts that you knew  
19 about this case?

20 A. Sharon Blackwell had shared that with  
21 me.

22 Q. And no other facts that you can recall  
23 at the moment?

24 A. No.

25 Q. Okay. Let's go back to your

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1 point in time asserted a claim or an argument that  
2 she was retaliated against?

3 A. Yes, I was told that by third parties.

4 Q. Can you tell me in your own words what  
5 you know had occurred or what she was alleging?

6 A. Just really what you said, that Mona  
7 Enfield was an employee of the Bureau of Indian  
8 Affairs, that she had been asked to move from  
9 Albuquerque to work in Reston, that she didn't  
10 want to, I'm not sure whether she moved or not,  
11 and that she was retaliated against somehow in  
12 relationship to that whole controversy. That all  
13 happened before I came on the scene, I didn't know  
14 anything about it, and it wasn't my responsibility  
15 to become actively involved. She was on paid  
16 leave, I was aware of that, in Albuquerque.

17 Q. Anything else?

18 A. That's it.

19 Q. And this move that you're talking  
20 about, what move?

21 A. Well, we had moved the Office of  
22 Information Resource Management -- not we, the  
23 Bureau of Indian Affairs did sometime prior to the  
24 time that I came in, from Albuquerque to Reston,  
25 Virginia.

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1 declaration.

2 MR. RAUH: What about Exhibit 9, are we  
3 going to ignore that?

4 MR. BALARAN: Yes, just for the moment.  
5 Oh, actually, thank you, Mr. Rauh.

6 BY MR. BALARAN:

7 Q. You did receive this notice of  
8 deposition that was Exhibit 9?

9 A. Yes.

10 Q. You were prepared to testify?

11 A. Yes.

12 Q. Did there come a point in time that you  
13 did so testify?

14 A. No. I presented myself at the  
15 appointed time and place and they, the  
16 attorneys --

17 Q. Who's they?

18 A. I don't know.

19 Q. Oh, okay. You used the word they.

20 A. The attorneys for both sides reached a  
21 settlement.

22 Q. Okay.

23 MR. RAUH: While Mr. McCaleb, and I  
24 believe this court reporter was sitting waiting to  
25 start the deposition, there was another discussion

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1 going on somewhere with someone, and we were told  
2 later by Mr. Gingold to go home, the matter had  
3 been resolved.

4 BY MR. BALARAN:

5 Q. Is that your understanding?

6 A. Yes.

7 Q. Let me read paragraph 7 again of your  
8 declaration. On October 10, 2002, in preparation  
9 for a scheduled deposition, anticipating questions  
10 regarding e-mail issues. Why were you  
11 anticipating questions regarding e-mail issues?

12 A. I was trying to anticipate all kinds of  
13 questions because I didn't have any facts relative  
14 to the matter at hand and I couldn't understand  
15 why I was being subpoenaed to testify.

16 Q. But the facts you did have, as you just  
17 told me, it had to do with OIRM, they had to do  
18 with retaliation, they had to do with Mona Enfield  
19 on paid leave, why would you anticipate questions  
20 regarding e-mail issues?

21 A. I guess I was anticipating questions  
22 about a plethora of issues relative to the Cobell  
23 case.

24 Q. Okay. Tell me what other issues you  
25 anticipated questions about.

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1 Q. You were in the process of going  
2 through the sent e-mails?

3 A. Right, I was going --

4 Q. Can you show --

5 A. I was going through the process of  
6 cleaning up my computer.

7 Q. Can you show me where it says that in  
8 an earlier --

9 A. It says --

10 Q. No, please. Stop for one second. We  
11 have to calm down here. When you tell me  
12 something and I ask you a question, please just  
13 wait until I finish. You testified a moment ago,  
14 as it said here in an earlier paragraph, you were  
15 going through your sent e-mail messages. Does it  
16 say that in here?

17 A. No, that's incorrect. It says in the  
18 earlier paragraph that I deleted e-mails in order  
19 to comply with the threshold memory limitation.

20 Q. You stated a moment ago that you were  
21 going to be more accurate about this, that this  
22 was accurate but you were going to give me or  
23 clarify. Why don't you do so?

24 A. I was in the process of cleaning up the  
25 computer and deleting some e-mails, and I had had

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1 A. The reorganization.

2 Q. The reorganization of what?

3 A. The Bureau of Indian Affairs within the  
4 Department of the Interior. The BITAM proposal.  
5 The consultations. The task force activities.

6 Q. Did anybody tell you that these were  
7 topics that you would be discussing?

8 MR. RAUH: Let me object. I think both  
9 the Department of Justice and private counsel want  
10 to object to that question at this time.

11 MS. KESSLER: Yes.

12 MR. BALARAN: Okay, all right.

13 THE WITNESS: I apologize, counsel, I'm  
14 a very forthcoming person.

15 MR. RAUH: You're also a very quick  
16 person.

17 BY MR. BALARAN:

18 Q. Anticipating questions regarding e-mail  
19 issues, I spoke with my administrative assistant  
20 to confirm that my e-mail messages had been saved  
21 as required. Is that correct?

22 A. A more accurate description, not that  
23 this is inaccurate, but I was in the process as I  
24 indicated in the earlier paragraph, of going  
25 through the sent e-mails.

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1 this, you know, question in my mind about what I  
2 was going to be queried about, and I thought that  
3 well, I'd better assure myself that we had all the  
4 e-mails. And that's when I raised the issue with  
5 Miss Maybee.

6 Q. And tell me how you raised the issue.

7 A. Well, she -- I was at my computer, and  
8 I asked her.

9 Q. Did you call her in the office?

10 A. Yeah.

11 Q. And what did you ask her?

12 A. I said, are all of my e-mails are  
13 backed up?

14 Q. Just like that?

15 A. Right, and I specifically asked as an  
16 example, do we have all the morning reports.

17 Q. Why did you pick that as an example?

18 A. Because it was something that came out  
19 every day.

20 Q. Did you give her any other examples?

21 A. No, I just asked for the morning  
22 reports.

23 Q. Did you ask her during this  
24 conversation whether or not you should have  
25 printed the OIRM report before deleting it?

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1 A. No, I don't remember asking that.  
 2 Q. It's possible you did?  
 3 A. No, I don't think so.  
 4 Q. So you asked her about saving the  
 5 e-mails, correct?  
 6 A. Yes.  
 7 Q. And what did she say?  
 8 A. I don't recall exactly what she said.  
 9 She conveyed to me that they weren't saved, that  
 10 she hadn't been saving them.  
 11 Q. And this is the first time you posed  
 12 this question to her, correct?  
 13 A. I think so, yes.  
 14 Q. And you did this because you  
 15 anticipated in response to a deposition about Miss  
 16 Enfield being queried about this matter?  
 17 A. A convergence of two events. I had the  
 18 deposition coming up, that was the possibility  
 19 that I might be asked questions about the e-mail.  
 20 I was in the process of cleaning e-mails off the  
 21 computer, and the convergence of those two events  
 22 caused me to ask the question.  
 23 Q. Now this doesn't say that, though.  
 24 This doesn't mention the other matter. This  
 25 doesn't mention the matter that you were cleaning

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1 up your e-mails. Why is that?  
 2 A. Well, I do mention it in the previous  
 3 paragraphs.  
 4 Q. Please tell me where. Show me what it  
 5 is you're referring to, that you cleaned up your  
 6 e-mails?  
 7 A. I began immediately deleting all e-mail  
 8 messages that were not Cobell related, and it has  
 9 a reference to paragraph 4 where it says --  
 10 Q. Right, in late spring and summer of  
 11 2002, sir. This is October 10, 2002. How could  
 12 there be a convergence at that point in time?  
 13 A. I think I just said there was the  
 14 convergence.  
 15 Q. Please, explain it to me again.  
 16 A. I was going through deleting e-mails on  
 17 sent e-mails, I just started --  
 18 MS. KESSLER: Mr. Balaran, it doesn't  
 19 say the late summer of 2002, number four doesn't.  
 20 MR. BALARAN: I understand.  
 21 MS. KESSLER: It says as a result of  
 22 these messages; it doesn't limit the time.  
 23 BY MR. BALARAN:  
 24 Q. Was your number 5 on October 10, 2002o?  
 25 MR. RAUH: Or before?

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1 BY MR. BALARAN:  
 2 Q. Any time. I'm asking, was it October  
 3 10, 2002?  
 4 A. No, its was before.  
 5 Q. So when before?  
 6 A. Well, when I received the message that  
 7 the threshold, the memory threshold was getting  
 8 full.  
 9 Q. And that's when you started deleting  
 10 the e-mail messages?  
 11 A. The incoming e-mail.  
 12 Q. Right, that's the late spring and  
 13 summer of 2002, correct?  
 14 A. Yes.  
 15 MS. KESSLER: That's when he started.  
 16 BY MR. BALARAN:  
 17 Q. That's fine. Did you delete e-mail  
 18 messages on October 10, 2002?  
 19 MR. BALARAN: Go ahead. You can  
 20 testify for him.  
 21 MS. KESSLER: No.  
 22 MR. BALARAN: No, no. You can testify  
 23 for him, but I'm asking you.  
 24 BY MR. BALARAN:  
 25 Q. Were you deleting e-mail messages on

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1 October 10, 2002?  
 2 A. I think I just said that I was deleting  
 3 sent e-mails.  
 4 Q. On October 10, 2002?  
 5 A. Yes.  
 6 Q. And so there was a convergence of  
 7 issues. There was the fact that you were deleting  
 8 them and the fact that you were about to be  
 9 deposed on an issue related to retaliation for  
 10 Mona Enfield?  
 11 A. Correct.  
 12 Q. Okay. Did you ask Miss Maybee for any  
 13 documents related to BITAM?  
 14 A. No.  
 15 Q. Did you ask her for documents related  
 16 to any of the other topics that you just specified  
 17 that you thought you might be asked about?  
 18 A. No. I asked for the daily reports  
 19 because they came daily and there would be a  
 20 number of them, and that would be a test.  
 21 Q. A test for what?  
 22 A. The recoverability of the e-mails.  
 23 Q. So you were trying to test the system?  
 24 A. I was trying to assure myself that  
 25 there were in fact recoverable, all the e-mails

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1 were recoverable.  
2 Q. Did you call the e-mail administrator?  
3 A. No, I did not.  
4 Q. Did you call anybody technical?  
5 A. I didn't know who the e-mail  
6 administrator was.  
7 Q. So, did you make an inquiry to find out  
8 who that person was or if such a person existed?  
9 A. No, I did not.  
10 Q. So you asked Miss Maybee to do it; is  
11 that correct?  
12 A. Yes.  
13 Q. Now to your knowledge, does Miss Maybee  
14 have that kind of computer expertise?  
15 A. No, I don't think she does, but she's  
16 my -- just as my deputy assistant secretary  
17 doesn't have specific knowledge of highway  
18 activities, I asked her to get information from  
19 the roadway people to refer back to me, so I don't  
20 have to talk to everyone of 3,000 people in my  
21 organization.  
22 Q. So, did you tell her to go to the  
23 e-mail administrator or some such person?  
24 A. I didn't instruct her who to go to, I  
25 just gave -- I said I'd like to know if I have, I

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1 wanted -- basically I said it this way, I think my  
2 e-mails are stored, is that right? There was this  
3 big long silence, and I said let's get the daily  
4 reports.  
5 Q. Let's get the daily reports?  
6 A. Right.  
7 Q. What kind of -- is that when you found  
8 out they were encrypted?  
9 A. I didn't find out they were encrypted  
10 until I read it a few days ago.  
11 Q. A few days ago being sometime this  
12 month?  
13 A. Yes.  
14 Q. What other information did you request  
15 for preparation for your deposition, because you  
16 mentioned about four or five different topics that  
17 you anticipated being queried about. What other  
18 information did you ask for?  
19 A. That's all I asked her for.  
20 Q. Who else did you ask for information,  
21 from who else?  
22 A. Oh, I sat down and discussed the Mona  
23 Enfield issue with the deputy commissioner, to  
24 make sure my recollection was correct.  
25 Q. Okay. And that's not responsive. My

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1 question to you is, you stated four or five topics  
2 in addition to the e-mail issue that you felt you  
3 might be queried on. Do you recall that?  
4 A. Uh-huh.  
5 Q. And I'm asking, did you ask anybody for  
6 documents related to any of these other topics to  
7 assist you in preparing for the Mona Enfield  
8 deposition?  
9 A. No.  
10 Q. Why not?  
11 A. I didn't feel that I had the need to.  
12 Q. Just the e-mail issue?  
13 A. Because that wasn't in my care, control  
14 and custody.  
15 Q. But BITAM was?  
16 A. I was intimately involved and had an  
17 extensive knowledge about BITAM.  
18 Q. So you didn't need those documents?  
19 A. That's right.  
20 Q. So the only documents you felt, of all  
21 of the topics you discussed with me, the only  
22 topic you needed documents on were the e-mail  
23 issues, correct?  
24 A. That I needed an assurance that we in  
25 fact had them.

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1 Q. Did Sharon Blackwell tell you that the  
2 retaliation issue had to do with e-mails?  
3 A. No.  
4 Q. Did anybody?  
5 A. No.  
6 Q. Who else did you discuss this with?  
7 MR. RAUH: Other than counsel.  
8 BY MR. BALARAN:  
9 Q. You can tell me who you discussed it  
10 with. I'm not asking the substance of the  
11 conversations.  
12 A. Counsel.  
13 Q. Personal counsel?  
14 A. And Department of Justice.  
15 Q. Solicitor's office?  
16 A. They were there, yes.  
17 Q. During the course of these discussions  
18 with professional -- not with personal counsel,  
19 but during your conversations with either Justice  
20 or Solicitor's office, did you receive any  
21 documents?  
22 A. I don't know. I don't think so.  
23 Q. Did you ask for any documents to assist  
24 with your preparation of the Mona Enfield  
25 deposition?

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1 A. No. In fact, the discussion centered  
2 around the fact that I had no personal firsthand  
3 knowledge and there was little reason for me to  
4 become educated on something I didn't have any  
5 knowledge of, by third parties.

6 Q. I have five drafts in my possession  
7 which I'm going to share with you, of the November  
8 8th Sabrina McCarthy letter to Peter Miller.  
9 Would that refresh your recollection if I told you  
10 that there were five such drafts?

11 A. No, it wouldn't. I didn't have any  
12 knowledge that there were five drafts.

13 Q. Okay.

14 A. That does not surprise me, but I had no  
15 knowledge of it.

16 Q. I'm just asking what you know, why  
17 wouldn't it surprise you?

18 A. Typically lawyers do a lot of I dotting  
19 and T crossing before they submit the final  
20 document in my experience.

21 Q. So they would submit a document with a  
22 lot of drafts without having consulted you for all  
23 of them, do you feel that's the way things are  
24 done?

25 A. I saw the final one.

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1 Q. You saw the final one before it was  
2 sent to me?

3 A. Yes.

4 Q. And you signed off on it?

5 A. Yes, I approved it.

6 Q. Well, when you say you approved it,  
7 what does that mean?

8 A. I mean I looked at it and thought the  
9 content of it was accurate.

10 Q. Okay.

11 MR. BALARAN: Just off the record for a  
12 second.

13 (Off the record discussion.)

14 MR. BALARAN: Back on.

15 (McCaleb Exhibit 10 marked for  
16 identification.)

17 BY MR. BALARAN:

18 Q. I'm handing you a document; it says  
19 discussion, subject, document retention related to  
20 trust management and Individual Indian Money  
21 accounts, the date on it is April 4th, 2002, and  
22 it's a memorandum from Bill Myers to the Office of  
23 the Secretary, et cetera. Do you see that?

24 A. Yes.

25 MR. RAUH: Now, is that also included

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1 in Exhibit 7?

2 MR. BALARAN: I don't know and I'll  
3 tell you why. I'm not sure that it is. In fact,  
4 I'm sure it's not actually.

5 BY MR. BALARAN:

6 Q. But look at your November 8th, or the  
7 November 8th, 2002 letter, if you would. Could  
8 you refer him to that, to page 3, footnote 3? Do  
9 you see that? We discussed that these are the  
10 dates that you were out of town?

11 A. Uh-huh.

12 Q. And you said you scanned those and  
13 those seemed to conform to your schedule. Now I  
14 would like you to look at April 4th, 2002, and it  
15 appears that you were out town at that point,  
16 correct?

17 MR. RAUH: I'll stipulate that's what  
18 paragraph 3 says.

19 BY MR. BALARAN:

20 Q. Okay. Do you recall where you were at  
21 that time?

22 A. Let's see. March 29, I think to the  
23 best of my recollection we were holding a tribal  
24 task force meeting in San Diego.

25 Q. Okay. Did anybody forward this, what

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1 exhibit is it now, Exhibit 10 to you?

2 A. I have no recollection of that.

3 Q. So you have not seen it before today?

4 A. No, I don't think so, principally  
5 because of the distinctive heading up here.

6 Q. What makes that distinctive heading  
7 something --

8 A. I just have never seen it before.

9 Q. I see. How about the memorandum itself  
10 without the distinctive heading, just something  
11 with that subject, that date, that content?

12 A. I don't have any specific recollection  
13 of having seen it before.

14 MS. KESSLER: Mr. Balaran, is it clear  
15 that this memorandum was issued on April 4th? I  
16 mean, the document is not at all clear. This is  
17 an e-mail that was sent on April 4th, and we have  
18 no idea when --

19 MR. BALARAN: I agree with you. It's  
20 just a document that came into my possession and  
21 I'm asking if he's seen it.

22 MS. KESSLER: Right. I'm just making  
23 it clear that this document is not dated, the  
24 e-mail is, but not the memorandum.

25 MR. BALARAN: Well, I agree with

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1 exactly what you're saying, counsel. However, not  
2 given anything else to go by, I have to go by the  
3 only date that's on here.

4 THE WITNESS: I want to make it clear  
5 that I'm not swearing that I was in San Diego on  
6 those dates. San Diego could have been the 21st  
7 to the 24th, but somewhere in that vicinity we had  
8 a meeting in San Diego. I would have to go back  
9 to my calendar to see specifically where I was.

10 BY MR. BALARAN:

11 Q. During your tenure as Assistant  
12 Secretary for Indian Affairs, have you ever had  
13 occasion to meet with Bryan Burns, Dominic Nessi,  
14 or anybody in the acting position, Debbie Clark,  
15 concerning the preservation and retention of  
16 e-mails?

17 A. Not specifically on that subject.

18 Q. How about generally on that subject?

19 A. Not with Dom, for sure. Debbie, I  
20 don't think so, and not with Bryan.

21 Q. During your tenure as Assistant  
22 Secretary for Indian Affairs, have you ever met  
23 with any of your staff concerning the preservation  
24 or retention of Cobell-related e-mails as they  
25 relate to the three functional areas?

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1 A. I have general knowledge of it. As I  
2 have said before, I can't identify a specific  
3 document that I read at a place in time.

4 Q. Have you ever taken any training of any  
5 sort, either formal or informal, that keeps you  
6 abreast of the Cobell litigation, any meetings?

7 A. No. I get copies of filings for the  
8 Cobell litigation.

9 Q. And do they go to you directly?

10 A. They are widely disseminated in the  
11 Department of the Interior.

12 Q. And when you say filings, do you mean  
13 copies of all pleadings, filings, motions that go  
14 back and forth?

15 A. I can't tell you that I get copies of  
16 all pleadings and filings. I get copies of a  
17 great many.

18 Q. Okay. Are you aware that there is  
19 currently an effort under foot to try and arrive  
20 at a definition of Indian Trust records, a uniform  
21 definition?

22 A. I'm aware that there is a need to do  
23 that.

24 Q. But my question is a little different.

25 A. I am not aware who the participants

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1 A. Yes. Pursuant to October 10th of 2002,  
2 I had been briefed by representatives from the  
3 Solicitor's office, specifically.

4 Q. Is that your staff?

5 A. Not my staff, no.

6 Q. Let me go back and ask the question  
7 again. During your tenure as Assistant Secretary  
8 for Indian Affairs, have you had occasion to meet  
9 with your staff where the topic of discussion was,  
10 or a topic of discussion was the preservation and  
11 retention of e-mails related to the three  
12 functional areas?

13 A. No.

14 Q. Okay. Has any directives or memoranda  
15 related to the retention or preservation of  
16 e-mails related to the three functional areas ever  
17 been distributed under your letterhead or under  
18 your name?

19 A. Not that I can recall.

20 Q. Is that something you would recall,  
21 signing such a directive?

22 A. I sign a great many papers. I just --  
23 not that I could have, I just don't recall.

24 Q. Do you recall reading such a directive  
25 that came from your office?

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1 would be.

2 Q. Well, I didn't ask you that either. My  
3 question was, are you aware -- let's start this  
4 way. Do you know whether there is in fact an  
5 initiative under foot to define Indian Trust  
6 records, Indian Trust data?

7 MR. RAUH: I think, Mr. Balaran, if you  
8 identify by whom, that might help.

9 BY MR. BALARAN:

10 Q. By anybody at the Department of The  
11 Interior.

12 A. We started that back in the fall of  
13 2001.

14 Q. And by that you're referring to with  
15 Redding, et cetera?

16 A. Right.

17 Q. And is this initiative one that there  
18 is a discrete group of people assigned to, to your  
19 knowledge?

20 A. I don't have knowledge of that.

21 Q. Are you involved in such discussions?

22 A. No.

23 Q. Are you given updates regularly as to  
24 the status of Interior's efforts to define Indian  
25 Trust data or records?

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1 A. I have not received any recently.  
2 Q. Have you received any at any time?  
3 A. Back in the fall of '01, I did, yes.  
4 Q. And that was the Redding, California  
5 meeting notes?  
6 A. Right.  
7 Q. But aside from that?  
8 A. I have no recollection of any since  
9 then, but I know that it's not resolved.  
10 Q. How do you know that?  
11 A. Because we had some conversations in  
12 the spring with Tom Slonaker.  
13 Q. Spring?  
14 A. Of '02.  
15 Q. And those conversations were what?  
16 A. That we had not resolved that issue.  
17 Q. Do you know what LRIS is?  
18 A. Sure.  
19 Q. Tell me.  
20 A. That's an acronym that stands for Land  
21 Realty Information Systems.  
22 Q. Do you know what information is  
23 contained on LRIS?  
24 A. Title, ownership -- well, not  
25 ownership, but who has title to it as the trust

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1 Billings, the Rocky Mountain regional office, and  
2 is deployed at Anadarko, the Southern Plains  
3 regional office.  
4 Q. So, it is deployed now?  
5 A. It is there and it's capable of finding  
6 current title.  
7 Q. Is it currently in use, do you know?  
8 A. Yes, at Billings.  
9 Q. So at Billings, is it what they call  
10 the system of record?  
11 A. Yes, it is.  
12 Q. Okay.  
13 MR. RAUH: You are going to tie this in  
14 to e-mail somehow?  
15 MR. BALARAN: Yes. You're objecting  
16 now?  
17 MR. RAUH: I'm just saying I'm waiting  
18 for you to tie this in with e-mail.  
19 MR. BALARAN: Then I will state for the  
20 record that they are tying in to the extent that  
21 there were e-mails that refer to these things and  
22 whether or not they fall within the three  
23 functional groups that need to be saved, or just  
24 other administrative e-mail, I'm entitled to know  
25 how he defines them.

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1 beneficiary.  
2 Q. And do you know where that information  
3 resides?  
4 A. Well, LRIS is the, what they refer to  
5 as the legacy system, where we came from, and the  
6 title information basically originates at the  
7 agency level and is usually maintained as  
8 historical information at the regional level.  
9 LRIS, the servers are in Reston, I think.  
10 Q. Any other legacy systems that you know  
11 of?  
12 A. No. There are other legacy systems.  
13 Historic title, LRIS has both historic title and  
14 the current title, I'm aware of that because  
15 that's an issue with TAAMS, the integration of  
16 historic and current title.  
17 Q. But are there any other legacy systems  
18 you can name for me now?  
19 A. No, I can't.  
20 Q. What's the status of the TAAMS system?  
21 A. It has been in suspense for some time.  
22 Q. Do you know why?  
23 A. Because the EDS report suggested that  
24 it be held in suspense, the deployment of it. And  
25 I know the system is existent and is deployed in

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1 MR. RAUH: Maybe you ought to ask him,  
2 were any of those e-mails that were involved in  
3 this issue --  
4 MR. BALARAN: Well actually, I did ask  
5 him that, so I think I've got what I need. If you  
6 want to supplement the answer, you're welcome to  
7 do so.  
8 Let's go off the record.  
9 (Off the record discussion.)  
10 BY MR. BALARAN:  
11 Q. Back on the record. I just want to in  
12 conclusion, it's my understanding that you  
13 recently tendered your resignation?  
14 A. That's correct.  
15 Q. What are your plans?  
16 A. Go back to Oklahoma and enjoy my  
17 children and grandchildren.  
18 Q. Do you intend to do any more work with  
19 the Department of the Interior?  
20 A. No. That doesn't preclude that, but  
21 that's not my plan.  
22 MR. BALARAN: Well, listen, I thank  
23 you, because in the first instance, you know, you  
24 willingly came in response to a letter that I  
25 wrote without having to go through a more formal

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1 process, and I want to explicitly acknowledge  
2 that, that we didn't have to go through any  
3 machinations or legal maneuvering and I'm very  
4 grateful for that.

5 I'm also grateful just from what I've  
6 seen from your footnote 3 of the November 8th  
7 letter that you travel more than anyone really  
8 should and that your time is quite valuable,  
9 especially so I'm sure in your last days.

10 Therefore, I do want to thank you for appearing  
11 today. And I just appreciate your candor and  
12 honesty. Obviously, we're going to have an  
13 opportunity to sit one more time where both  
14 counsel will have the ability to question you  
15 about this issue alone, and what else can I say  
16 but thanks very much.

17 MR. RAUH: Let me just ask Mr. Gingold,  
18 do you have a concept of the amount of time that  
19 you need.

20 MR. GINGOLD: It depends on the  
21 answers.

22 MR. RAUH: Maybe you can go for the  
23 next ten minutes.  
24  
25

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1 MR. GINGOLD: Oh, it's going to be  
2 longer than that. I'm just talking about, it will  
3 not take all day, that's for sure.

4 (Whereupon, at 1:20 p.m., the taking of  
5 the instant deposition ceased.)  
6  
7

8 \_\_\_\_\_  
9 Signature of the Witness

10 SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day  
11 of \_\_\_\_\_, 20\_\_\_\_.

12 \_\_\_\_\_  
13 Notary Public

14 My Commission Expires: \_\_\_\_\_  
15  
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December 12, 2002

BY FACSIMILE

Alan L. Balaran, Special Master  
1717 Pennsylvania Ave., N.W., 12th Floor  
Washington, DC 20006

Re: Transcripts of Depositions Regarding the Deletion of Assistant Secretary  
for Indian Affairs McCaleb's E-mails

Dear Mr. Balaran:

I am writing to advise you that, as I myself just noticed, the transcript of the December 6 deposition of Assistant Secretary for Indian Affairs Neal McCaleb states "Confidential-Subject to Protective Order." As you know, there is no such protective order regarding this deposition, or any of the depositions you are conducting concerning the deletion of Mr. McCaleb's e-mails.

Thank you.

Sincerely,

Amalia D. Kessler  
Trial Attorney  
Commercial Litigation Branch

cc: Dennis M. Gingold, Esq.  
Keith M. Harper, Esq.  
Sabrina McCarthy, Assistant Solicitor for Trust Reform

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